

STATE OF MICHIGAN
IN THE SUPREME COURT

BOARD OF TRUSTEES OF THE CITY
OF PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH AND
INSURANCE TRUST,

Supreme Court No. 151717

Plaintiffs/Appellees,

Court of Appeals No. 31-6418

v.

Oakland County Circuit Court
Case No. 12-128625-CZ

CITY OF PONTIAC, Michigan,

Defendant/Appellant.

**DEFENDANT/APPELLANT'S
SUPPLEMENTAL BRIEF IN SUPPORT OF ITS
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

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In the Court's September 30, 2015 Order, it asked the parties to submit supplemental briefing "addressing the meaning and applicability of the language 'to continue to make contributions' in the Emergency Manager's August 1, 2012 order No. 225." (**Exhibit A**).

1. ORDER S-225 AND THE EMERGENCY MANAGER'S STATED INTENT

On August 1, 2012, the Emergency Manager issued Executive Order 225 to amend the trust pursuant to MCL 141.1519(1)(k) of 2011 PA 4, to terminate the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012.¹ The order read with respect to its substantive provision as follows:

Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect. [Exhibit D to Application.]

Contemporaneous with Order 225, the Emergency Manager had to obtain approval from the State Treasury. In doing so, the Emergency Manager stated that, "[u]nless action is taken to eliminate the VEBA contribution obligation, the City anticipates that it will not be able to make the annual contribution required by the Trustees in June 2012, and for subsequent years thereafter." (Exhibit B to Application at Pg 3.) Further, the Emergency Manager found that "[t]he City will

¹ Order S-225 also modified the contribution to be made in 2012-2013.

not be able to pay the expected VEBA contribution of \$4,381,269 for the fiscal year ending June 30, 2012.” (*Id.*)

2. THE PLAIN LANGUAGE OF ORDER S-225 REMOVED THE OBLIGATION TO MAKE CONTRIBUTIONS IN THE FISCAL YEAR ENDING JUNE 30, 2012

“The primary goal of statutory interpretation is ‘to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute.’” *Epps v 4 Quarters Restoration LLC*, No. 147727, ___ Mich ___; ___ NW2d ___ (2015)(quoting *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008))(Exhibit A). When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein. *Allison*, 481 Mich. at 427. If a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word. *Id.*, citing *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). “Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory.” *Whitman v City of Burton*, 493 Mich 303, 311-12, 831 NW2d 223, 229 (2013). As this Court further explained in *Whitman*, as a general rule, courts may not judicially impose new language not contained in an unambiguous statute. *Id.*, at 313.

In interpreting the above Order, the Court of Appeals began by defining the word “continue.” The Court of Appeals held:

The term “continue” means to “go on or keep on without interruption, as in some course or action.” *Random House Webster’s College Dictionary* (1992). Plainly, the term “continue” relates to present and future action. **(Exhibit B).**

After defining the word “continue,” the Court of Appeals then added language to the Order and held that the Order “did not apply to the to the City’s already accrued actuarial required contribution.” (emphasis added.) Nowhere in the Emergency Manager’s Order did he state that the Order only applied to *accrued* obligations. Rather, the Emergency Manager’s Order modified the City’s obligation to “continue to make contributions. . . .” Order S-225 did not limit itself to not yet accrued debts; had this been the intent, the Emergency Manager surely could have said so.

The Court of Appeals correctly held that the word “continue” applied only to “present and future action.” However, the Court of Appeals erred in applying this definition to Order S-225. As the 2011-12 obligation had not yet been paid when Order S-225 was issued, the payment was outstanding and was very much a *present* obligation. The Court of Appeals used the phrase “continue to” to modify the accrual date, which was a *subject* not even addressed by Order S-225. This was error. Order S-225 speaks to the *action* of “mak[ing] contributions.” The phrase “continue to” was used to discuss the action of making contributions—i.e., making payments.

The Court of Appeals committed reversible error when it modified Order S-225 by reading additional language into it. As the 2011-2012 contribution was present and outstanding, Order S-225 applied.

3. THE EMERGENCY MANAGER'S INTERPRETATION OF HIS OWN ORDER IS ENTITLED TO DEFERENCE

As this Court has explained, “a reviewing court is to give deference to a municipality's interpretation of its own ordinance.” *Macenas v Village of Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989). While the present lawsuit does not address an “ordinance,” it does address a City Emergency Manager taking legislative action on behalf of a City. This Court should afford the Emergency Manager’s interpretation of Order 225 deference. Unlike traditionally legislative history—which attempts to decipher the intent of a collective body—the Emergency Manager is the only person whose intent matters. And, in this case, his intent was specifically stated in his July 10, 2012 correspondence to the State Treasury. The stated intent of S-225 included modifying the City’s obligation to make the payment accrued in the fiscal year July 1, 2011 through June 30, 2012. For example:

- “[u]nless action is taken to eliminate the VEBA contribution obligation, the City anticipates that it will not be able to make the annual contribution required by the Trustees in June 2012, and for subsequent years thereafter.”
- “[t]he City will not be able to pay the expected VEBA contribution of \$4,381,269 for the fiscal year ending June 30, 2012.”

The drafter of the Uniform Commercial Code, Professor Llewellyn, suggested that statutes and rules should be drafted in a manner that articulates the reason for its

existence and incorporates the reason onto its face.² Order S-225, when read in conjunction with the Emergency Manager's letter, does just that. The Emergency Manager stated that the City could not make the contributions required for 2011-2012. The Emergency Manager then took action to address this dire situation. As the Emergency Manager's express intent and purpose is clear, the Court of Appeals should have afforded deference to the Emergency Manager's interpretation, especially considering that the Court of Appeals held that such action would have been legal and proper.

4. THE ABSURD RESULTS DOCTRINE ALSO CONFIRMS THAT THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR

Justice Markman explained the absurd results doctrine at length in *Cameron v Auto Club Ins*, 476 Mich 55; 718 NW2d 784 (2006). In doing so, he held that "the 'absurd results' rule is one that complements and reinforces the doctrine of interpretivism." Quoting Justice Scalia, he noted that "it is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp v Cartier, Inc*, 486 US 281, 324 n 2; 108 S Ct 1811; 100 L Ed 2d 313 (1988) (Scalia, J., concurring in part and dissenting in part). The "absurd results" rule underscores that the ultimate

² See LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY, 251 (forthcoming 2007) (manuscript on file with author) (the "singing rule" "suggests that the best type of law is that which provides the reason for the law's adoption on its face"); see also Soia Mentschikoff, *Karl N. Llewellyn*, 9 INT'L ENCYCLOPEDIA SOC. SCI. 440, 440 (1968) (claiming that singing rules help bridge the gap between laws and their rationales).

purpose of the interpretative process is to accord respect to the judgments of the lawmakers. While it must be presumed that these judgments are almost always those reflected in the words used by the lawmakers, in truly extraordinary cases, exercise of the "judicial power" allows recognition of the fact that no reasonable lawmaker could conceivably have intended a particular result. As Justice Kennedy observed in a concurring opinion in *Public Citizen v US Dep't of Justice*, 491 US 440, 470; 109 S Ct 2558; 105 L Ed 2d 377 (1989), the "absurd results" rule "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way."

Even if this Court were to determine that Order 225 was ambiguous, or even if the Court believed that the Order was unambiguous and agreed with the Court of Appeal's interpretation, the Order should not be interpreted in a manner that is contrary to the goal of the Order. The City was in receivership; an Emergency Manager was appointed; he stated his intent to modify the obligation to contribute to the VEBA for 2012 and thereafter. This conclusion is buttressed by the fact that *Plaintiff even agreed* that Order 225 applied to contributions due in fiscal year 2012. *See, e.g.* (Pl's Response to MSD at 5)(**Exhibit C**) (arguing that "[e]xecutive order 225 purports to unilaterally amend the VEBA trust so that the City is no longer required to make an annual contribution..."); (Complaint, *passim*)(**Exhibit D**)(only arguing that the Order would be illegal, but never suggesting that the Order did not

purport to modify the City's obligation.) Among the parties affected by Order S-225, there was no confusion as to its meaning. Given the surrounding constellation of facts, there should be no doubt that the Emergency Manager's purpose was to modify amounts owed for 2011-2012.

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Dated: November 10, 2015

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by the Court's TrueFiling efilng system.

/s/ Joan M. Flynn

JOAN M. FLYNN

EXHIBIT A

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL

 KeyCite Red Flag - Severe Negative Treatment
Affirmed in Part, Reversed in Part by Epps v. 4 Quarters Restoration
 LLC, Mich., September 28, 2015

2013 WL 2460119

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
 COURT RULES BEFORE CITING.

UNPUBLISHED
 Court of Appeals of Michigan.

Danny **EPPS** and Joyce **Epps**, Plaintiffs–Appellees,
 v.

4 QUARTERS RESTORATION, L.L.C.,
 Denaglen Corp., d/b/a MBM Check
 Cashing, Emergency Insurance Services,
 and Troy Willis, Defendants–Appellants,
 and

AM Adjusting & Appraisals, L.L.C., Michael
 N. Anderson, Jr., Home Owners Insurance
 Company, Paula Mathews, Maximum **Restoration**,
 L.L.C., Auto Owners Insurance Company,
 Charles Willis, and Comerica Bank, Defendants.

Docket No. 305731. | June 6, 2013.

Before: GLEICHER, P.J., and SAWYER and FORT HOOD,
 JJ.

Opinion

PER CURIAM.

*1 Defendant Troy Willis misrepresented himself as a licensed residential builder and convinced plaintiffs Danny and Joyce **Epps** to hire his companies to restore their home after a flooding event. Willis's misrepresentations rendered the contracts between the parties void and nullified the legal effect of a contemporaneously granted power of attorney. Absent a valid power of attorney, Willis had no authority to accept delivery of, endorse, or negotiate insurance checks on the **Epps'** behalf. The circuit court therefore correctly ruled that Willis and his companies must return the insurance check proceeds to Danny and Joyce **Epps**.

As the **Epps** were entitled to the proceeds as a matter of law, defendant MBM Check Cashing, which paid the check

proceeds to Willis, could have no meritorious defense as to the **Epps**. The court properly awarded the **Epps** the facial value of the checks from funds that had been debited from MBM's bank account and placed in escrow. We affirm.

I. BACKGROUND

In July 2006, plaintiffs Danny and Joyce **Epps** (the **Epps**) experienced a flooding event in the basement of their home. The **Epps** contacted their homeowner's insurance carrier, which, acting through an intermediary adjusting company, recommended that the **Epps** contract with defendant Troy Willis and his companies, defendants **4 Quarters Restoration** (4QR) and Emergency Insurance Services (EIS) (collectively the "contractor defendants") to complete the remediation and reconstruction work. Willis met with the **Epps** at their home and showed them a book depicting some of his work. The book also displayed a copy of Willis's residential builder's license. The **Epps** hired Willis, signing a misnamed "Fire Repair Agreement" with EIS and a "Work Authorization" with 4QR. The **Epps** also signed an "Insurance Power of Attorney" prepared on EIS letterhead that included the phrase "Licensed Residential Builders # 2101157151." The power of attorney itself provided:

To: The Insurance Companies

Their Agents

All Concerned Parties

I Danny **Epps** & Joyce **Epps**, hereby give my (Contractor), Troy Willis Power of Attorney, to sign my name to all documents pertaining to settling the insurance claim and restoring the damage to my property located at 5503 Pennsylvania, Detroit, Michigan.

Despite the representation included on the EIS letterhead and the license contained in Willis's portfolio, the state had actually revoked Willis's residential builder's license on January 31, 2006. The parties dispute the quality of the work performed by the contractor defendants and whether the work was actually completed. It is not disputed, however, that during the construction process Willis alone endorsed all checks issued by the insurance carrier regardless of whether the **Epps** were named as the only payees or as copayees. The **Epps** assert that this was done without their knowledge or approval. Willis negotiated the checks at defendant Denagen Corporation d/b/a MBM Check Cashing (MBM).¹

*2 On July 23, 2009, the **Epps** filed suit against every insurer, company, bank, and principal involved in the actual work done to their basement or with the flow of funds related to the project. In relation to the contractor defendants, the **Epps** complained that none of the workmen were licensed residential builders as required by state law. The **Epps** asserted that Willis misrepresented himself as licensed and thereby fraudulently induced them to hire him and his companies. The **Epps** sought "a declaration that the contract was illegal, void and unenforceable, that defendants [] Willis, [4QR] and EIS were not entitled to receive any monies for their work as unlicensed contractors and that all monies they received were received illegally and must be returned to" the **Epps**. The **Epps** also sought to rescind the contracts.

The **Epps** further complained that the contractor defendants failed to complete the contracted-for work and that the completed portion was not done in a workmanlike manner. As a result, the **Epps** claimed they were damaged by the loss of the insurance proceeds. The **Epps** accused the contractor defendants of embezzling, stealing or converting those proceeds and sought treble damages under MCL 600.2919a. Willis allegedly committed this tort by instructing payors to remit any checks to his address and then endorsing and negotiating the checks without the **Epps**' knowledge.

The **Epps** secured a default judgment against MBM, which the circuit court repeatedly refused to set aside. Comerica Bank, at which MBM maintained accounts and through which MBM satisfied the subject checks, filed an interpleader complaint, seeking to place the challenged sum in escrow until the court could determine the rightful owner. The court granted that request. The claims against Comerica were thereafter dismissed with prejudice. The claims against the various other defendants were whittled away through dismissals and defaults.²

In relation to the contractor defendants, the parties filed competing motions for summary disposition that were eventually resolved in the **Epps**' favor. Citing MCL 339.2412, which precludes an unlicensed contractor from bringing a collection action, the **Epps** contended that the various contracts entered with the contractor defendants were void *ab initio* as Willis was an unlicensed contractor. The power of attorney was never valid. Therefore, Willis lacked the authority to endorse the insurance checks on the **Epps**' behalf and the proceeds had to be returned to them.

The contractor defendants sought partial summary disposition, arguing that Willis's lack of a license was not a ground for vitiating the contract and depriving defendants of the funds paid for the work completed. As the **Epps** otherwise suffered no damages, the contractor defendants asserted that their claim lacked merit. These defendants further noted that Willis's unlicensed status did not preclude them from raising the lack of actual damages as a defense.

*3 At a June 24, 2011 hearing on these competing motions, the circuit court promised the parties, "I'll get back to you in a few days." Without explaining its reasoning, the court entered an order on July 11, 2011, granting summary disposition in the **Epps**' favor. The court found simply, "MCL 339.2412(1) is applicable in this case and [the **Epps**] are entitled to summary disposition as a matter of law."

II. STANDARD OF REVIEW

We review de novo a circuit court's resolution of a summary disposition motion. *Wayne Co v. Wayne Co Retirement Comm*, 267 Mich.App 230, 243; 704 NW2d 117 (2005). The **Epps** sought summary disposition under MCR 2.116(C)(7) (without citing a justification under the subrule), (8) (failure to state a claim), (9) (failure to state a valid defense), and (10) (failure to create a genuine issue of material fact). As the circuit court considered evidence beyond the pleadings, we will review the motion as if granted under (C)(10). See *Kefgen v. Davidson*, 241 Mich.App 611, 616; 617 NW2d 351 (2000). A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v. Taylor*, 263 Mich.App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v. Gen Motors Corp*, 469 Mich. 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich.App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich. at 183.

We also review underlying issues of statutory interpretation and applicability de novo. *Adams Outdoor Advertising, Inc v.*

City of Holland, 463 Mich. 675, 681; 625 NW2d 377 (2001). The goal of statutory interpretation is to discern the intent of the Legislature. Where the legislatively chosen language is plain and unambiguous, we must apply the statute as written. Only where a statute is ambiguous may we employ the tools of statutory construction. *Rose Hill Ctr, Inc v. Holly Twp*, 224 Mich.App 28, 32; 568 NW2d 332 (1997).

III. APPLICATION OF MCL 339.2412

The circuit court determined that MCL 339.2412(1) applied to this case as a matter of law and nullified the contractor defendants' entitlement to the funds they received for the contract work. The statute provides:

A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor *shall not bring or maintain an action* in a court of this state *for the collection of compensation* for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. [Emphasis added.]

*4 Because the contractor defendants did not "bring or maintain an action ... for the collection of compensation," the circuit court improperly held them liable based on the statute.

"Under the statute, a builder may not bring an action for collection of compensation unless it can prove that it possesses the license 'required by this article.'" *Stokes v. Millen Roofing Co*, 466 Mich. 660, 664; 649 NW2d 371 (2002). In *Stokes*, the unlicensed defendant argued that MCL 339.2412(1) did not prevent it "from recovering the reasonable value of the labor and materials furnished to the plaintiffs.... [S]uch an action would be seeking merely a reimbursement for its materials, and not 'compensation' as that word is used in the act." *Stokes*, 466 Mich. at 665. The Court defined "compensation" "as something given or received as an equivalent for services, debt, loss, injury, etc.; indemnity; reparation; payment." *Id.* (quotation marks and citation omitted). The unlicensed defendant was therefore precluded from seeking compensation for its labor and materials provided under the contract. *Stokes* also held that

a court may not employ equitable remedies to circumvent the statutory prohibition on unlicensed builders seeking compensation. Doing so would "allow[] an unlicensed contractor leverage to force payment, using equity in a circumstance where no equity was required." *Id.* at 671.

In *Roberson Builders, Inc v. Larson*, 482 Mich. 1138; 758 NW2d 284 (2008), our Supreme Court heard oral arguments but then decided to deny leave to appeal in a case in which an unlicensed residential builder sought a set off against a homeowner's counterclaim for damages. Concurring in the order, Justice Marilyn Kelly, joined by Justice Young, reasoned that a builder that defends an action by seeking a set off against the damages claimed is actually seeking payment that is forbidden under *Stokes'* interpretation of the statute. *Id.* at 1140.

An unlicensed builder is not deprived of all rights, however. As stated by this Court in its brief decision in *Parker v. McQuade Plumbing & Heating, Inc*, 124 Mich.App 469, 471; 335 NW2d 7 (1983), "But the statute nowhere prohibits an unlicensed contractor from defending a breach of contract suit on its merits. The statute removes an unlicensed contractor's power to sue, not the power to defend. It was intended to protect the public as a shield, not a sword."

Here, the contractor defendants simply defended against the **Epps'** claims of poor workmanship and stealing funds. The contractor defendants were free to defend on the merits by claiming that the work completed was of adequate quality and that the insurance proceeds collected by Willis funded the renovation project. There is no precedent for allowing a homeowner to use MCL 339.2412(1) to recoup funds already paid to a builder for completed work based solely on his unlicensed status. The **Epps** presented no evidence beyond bare assertions that the renovations performed at their home were unsatisfactory. Similarly, the **Epps** provided no support for their assertion that Willis converted the insurance proceeds for his own personal use, rather than to cover the costs of the renovations. Under these circumstances, the circuit court should not have summarily disposed of the claims against the contractor defendants based on the statute.

IV. CONTRACT VOID AB INITIO

*5 The **Epps** were entitled to summary disposition in their favor on other grounds, however. Willis misrepresented that he and his companies, 4QR and EIS, were licensed residential

builders as mandated by state law. Had Willis truthfully informed the Epps that his license had been revoked, the Epps contend that they would not have hired him to perform the renovation work at their home.

Generally, “[f]raud in the inducement to enter into a contract does not render the instrument void but merely voidable.” *Whitcraft v. Wolfe*, 148 Mich.App 40, 52; 384 NW2d 400 (1985), citing *Dunn v. Goebel Brewing Co*, 357 Mich. 693, 697; 99 NW2d 380 (1959). “Where a license or certification is required by statute as a requisite to one practicing a particular profession,” and a party enters a contract without possessing the required license, the contract is void. *Wedgewood v. Jorgens*, 190 Mich. 620, 622; 157 NW 360 (1916) (quotation marks and citation omitted). “[C]ontracts by a residential builder not duly licensed are not only voidable but void.” *Bilt–More Homes, Inc v. French*, 373 Mich. 693, 699; 130 NW2d 907 (1964) (quoting from and adopting the circuit court’s reasoning in that matter). By fraudulently inducing the Epps to enter into the project contracts by misrepresenting his possession of a statutorily-required license, Willis rendered the contracts void.

Willis’s fraud rendered the power of attorney entered by the Epps void *ab initio*. Willis therefore had no authority to endorse and negotiate checks issued by the insurance company on the Epps’ behalves. Without the power to negotiate the checks, Willis had no right to maintain the proceeds. It is on this ground, rather than based on MCL 339.2412, that Willis must return the insurance proceeds to the Epps. Although the circuit court based its decision on improper grounds, it correctly granted summary disposition in the Epps’ favor.³

V. TREBLE DAMAGES UNDER MCL 600.2919A

After the circuit court entered summary disposition in the Epps’ favor, they sought treble damages against the contractor defendants, arguing that those defendants had converted the Epps’ property by endorsing the insurance checks without the authority to do so. In their reply brief on appeal, the contractor defendants contend that this award was improper. As this issue was not properly presented to this Court as an issue on appeal, we need not address it. *Mich Ed Ass’n v. Secretary of State*, 280 Mich.App 477, 488; 761 NW2d 234 (2008). We note, however, that as Willis lacked the authority to endorse the insurance checks, he did convert the proceeds by accepting delivery and cashing those

instruments. See MCL 440.3420(1) (“An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.”). MCL 600.2919a(1) specifically provides for treble damages in the face of such a conversion.

VI. DEFAULT AGAINST MBM

*6 Early in the proceedings, the circuit court entered a default judgment against MBM. MBM had not timely responded to the complaint, believing that the Epps had granted them an extension. After the circuit court granted summary disposition in the Epps’ favor, the court declined to conduct a hearing to determine the amount of damages. As noted by the court, there was no fact question regarding the damages amount; damages were simply measured by the face value of the insurance checks. The court ordered the interpleader funds paid out to the Epps to cover the damages award. The interpleader funds had been debited from MBM’s accounts at Comerica Bank.

MBM argues that it was entitled to a jury trial on the damages issue. If a trial court decides to conduct a hearing to determine the amount of damages, a defaulted party is entitled to a jury trial on that issue. *Zaiter v. Riverfront Complex, Ltd*, 463 Mich. 544, 554; 620 NW2d 646 (2001). No hearing was required in this case as the damages were a sum certain. MBM was therefore not entitled to a jury trial.

We note that MBM has a cause of action against Willis for wrongfully negotiating the Epps’ insurance checks and causing MBM to be liable for the sums paid out. As emphasized by the Epps’ attorney at a motion hearing seeking the entry of a money judgment, MBM did not file such an action against Willis because “they are represented by the same lawyer.” We cannot discern from the record whether the contractor defendants and MBM are connected through interested individuals. It is curious, however, that even after the conflict of interest was brought to MBM’s attention, MBM did not secure independent counsel and joined the contractor defendants in filing a single appeal. And there is no evidence that defendants waived the conflict. We suggest that MBM consider and protect its interests if those interests truly are separate from those of the contractor defendants.

Affirmed.

All Citations

Not Reported in N.W.2d, 2013 WL 2460119

Footnotes

- 1 It appears from documentation in the lower court record that the **Epps** may have chosen to forego personal property **restoration** services and used the funds for that portion of the renovation to hire the contractor defendants to perform elective work on the home's main floor.
- 2 The **Epps** contend that this Court lacks jurisdiction to consider defendants' claim of appeal pursuant to *Detroit v. Michigan*, 262 Mich.App 542, 545–546; 686 NW2d 514 (2004), because the claims against Charles Willis, who is not a party to this appeal, were dismissed without prejudice. Even if that dismissal eliminated the existence of a final judgment from which a claim of appeal could be taken, MCR 7.202(6)(a)(i), we could consider this appeal as if taken on leave granted "in the interest of judicial economy." *Detroit*, 262 Mich.App at 546.
- 3 The contractor defendants contend that they should be able to retain at least that portion of the proceeds covering work for which no license was required. This misses the point that the **Epps** would not have entered into any contract with defendants had Willis truthfully informed them that his builder's license had been revoked. Absent a contract, the **Epps** would not have given Willis a power of attorney.

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EXHIBIT B

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
**DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL**

STATE OF MICHIGAN
COURT OF APPEALS

BOARD OF TRUSTEES OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH &
INSURANCE TRUST,

FOR PUBLICATION
March 17, 2015
9:05 a.m.

Plaintiff-Appellant,

v

CITY OF PONTIAC,

No. 316418
Oakland Circuit Court
LC No. 2012-128625-CZ

Defendant-Appellee.

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Plaintiff Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Plan (trustees) appeals by right Oakland Circuit Judge Daniel Patrick O'Brien's order granting defendant's motion for summary disposition as to plaintiff's complaint to require the city to pay its required annual contribution to the trust for the fiscal year ending June 30, 2012. The trust was established in 1996 as a tax exempt voluntary employees' beneficiary association (VEBA), 26 USC 501(c)(9), to hold the contributions of police and firefighter employees and those of the city pursuant to collective bargaining agreements (CBAs) between the city and the various unions of the city's police officers and firefighters. The trust held and invested these contributions to provide health, optical, dental, and life-insurance benefits to police and fire employees who retired on or after August 22, 1996, as required by the various CBAs. At issue is the efficacy of Executive Order 225 issued on August 1, 2012, pursuant to § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k), by the city's emergency manager (EM), Louis H. Schimmel, which purported to amend the trust to remove the city's annual obligation to contribute to the trust agreement "as determined by the Trustees through actuarial evaluations." The trial court accepted defendant's argument that the city's EM properly modified the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012, by modifying the existing CBAs between the city and police and firefighter unions. The trial court also ruled that plaintiff's claim under Const 1963, art 9, § 24, was without merit pursuant to *Studier v Michigan Pub Sch Employees Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005). We conclude, even assuming that Executive Order 225 was properly adopted pursuant to § 19(1)(k), that it did not retroactively eliminate the city's obligation to contribute to the trust for

the fiscal year ending June 30, 2012; consequently, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2012, the Board of Trustees of the City of Pontiac Police and Fire Retirement System and plaintiff trustees filed their complaint in circuit court asserting that defendant funded the City of Pontiac Police and Fire Retirement System (PFRS), which provided retirement benefits to retired police and fire employees. In addition, plaintiffs asserted that defendant funded the trust, a tax-exempt VEBA, 26 USC 501(c)(9), which provided health, optical, dental, and life-insurance benefits to police and fire employees who retired on or after August 22, 1996. The trust is administered by its board of trustees comprised of five members consisting of the city's mayor, the city's finance director, and a firefighter, a police officer, and a fifth trustee selected by the other trustees, who could be a participant in the trust. Art IV, § 1. Plaintiffs alleged that defendant, through its EM, failed to pay its required contribution to the trust for the fiscal year between July 1, 2011 and June 30, 2012, which was actuarially determined to be \$3,473,923.28. The trust includes the following relevant provisions:

ARTICLE I

Definitions

* * *

Section 3: Contributions - The term Contributions as used herein, shall mean the payment required to be made to the Trustees and to the Trust Fund by the City *under the authority such as ordinance or City Council resolution or under any applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements* for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan.

* * *

ARTICLE II

Establishment of Trust

Section 1: The purpose of this Trust Fund . . . is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan The

Grantor^[1] intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution.

* * *

ARTICLE III

Contributions to the Trust Fund

Section 1: (a) The City-Employer shall be required to pay to the Trust Fund such amounts as the Trustees may determine are actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the Actuary for the Trust to result in a Prefunded Plan.

Such contributions shall also be made in accordance with the Collective Bargaining Agreements between the collective bargaining associations and the employer City and this Trust Agreement, and such other regulations of the Board of Trustees as are not inconsistent with the aforesaid authority.

(b) In addition to the amounts paid by the City on behalf of Participants as set forth above and in the Collective Bargaining Agreements, the City shall contribute to the Trust Fund such additional moneys which together with those contributions and return on investments shall be sufficient to fund the benefits provided on a sound actuarial basis. Participants shall contribute those amounts required for additional extended Family Riders in effect as of 8-22-96 and otherwise as determined by the trustees.

* * *

Section 2. The Trustees may compel and enforce payments of contributions, in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

* * *

ARTICLE V

Powers and Duties of the Trustees

* * *

¹ "Grantor" is undefined but the "declaration of trust and agreement" is stated to be by the city and the trustees of the trust and is signed by the city's mayor and finance director in that capacity and also in the capacity as trustees and by the other two original trustees.

Section 2: The Trustees shall carry out the purposes of this Trust Agreement, and may maintain any health benefit programs and insurance policy or policies now in force and effect and available to Police and Fire retirees of the City of Pontiac or may substitute other comparable or superior policies in lieu thereof. In providing group life insurance to the Participants of this Plan so as to effectuate the purposes of this Trust Agreement, the Trustees shall be bound by the terms of this Trust Agreement *and any applicable Collective Bargaining Agreements between the City and the collective bargaining associations* and shall comply with all applicable laws.

* * *

ARTICLE VII

Liabilities of the Parties

Section 1: The City shall not be liable for payment to the Trust of any amounts other than those required of it by this Trust Agreement or any applicable Collectible Bargaining Agreement. The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, *except as provided by the terms of the Collective Bargaining Agreements* between the collective bargaining association and the City and the terms of this Trust Agreement. . . .

* * *

ARTICLE X

Amendments

Section 1: The provisions of this Declaration of Trust and Agreement may be amended at any time, by (A) collective bargaining between the collective bargaining associations identified in Article 1, Section 8 and the City of Pontiac (B) by a unanimous vote of the five (5) Trustees, concurred in by the City Council of the City of Pontiac provided, however, that such Amendments are not inconsistent with any applicable Collectible Bargaining Agreements and do not adversely affect the tax exempt status of the 501(c)9 Trust. . . . [Declaration of Trust, executed January 30, 1997 (emphasis added).]

Although the plain language of the trust does not directly state when a required contribution is due, plaintiff asserts and defendant agrees that the actuarial required contribution to the trust for the fiscal year commencing July 1, 2011 and ending June 30, 2012, was due on or before June 30, 2012. It is also undisputed that during the fiscal year ending June 30, 2012, the city's EM entered termination collective bargaining agreements with the various police and firefighter unions. The city also contracted to receive police services from Oakland County effective August 1, 2011, and fire services from Waterford Township, effective February 1, 2012.

On August 1, 2012, the city's EM issued Executive Order (EO) 225 that purported to amend the trust pursuant to MCL 141.1519(1)(k) of 2011 PA 4, to terminate the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012. The order read with respect to its substantive provision as follows:

Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations.

The Order shall have immediate effect.

The issuance of EO 225 was preceded by the EM's letter of July 10, 2012 to State Treasurer Andrew Dillon, seeking concurrence in the EM's plan to invoke the authority of § 19(1)(k) of PA 4 to modify the trust by modifying existing CBAs to eliminate the city's obligation to contribute to the trust. The letter outlined provisions of the trust regarding contributions, art III, §§ (1)(a) & (b), and its provisions regarding amendments, art X, § (1). The EM also stated in the letter that he "anticipated that the City will be required by the Trustees of the VEBA to contribute \$3,915,371 during the fiscal year ending June 30, 2013."

In further making the case for the exercise of authority under § 19(1)(k) of PA 4, the EM wrote that he was unable to negotiate with local police and firefighter unions because the city had contracted for police and firefighter services, and the local unions no longer existed. The EM also noted that amendment of the trust by unanimous action of the trustees under art X would not occur. The EM observed that "[u]nless action is taken to eliminate the VEBA contribution obligation the City anticipates that it will not be able to make the annual contribution required by the Trustees in June 2012, and for subsequent years thereafter." The EM also noted the termination of the city's obligation to the trust for the fiscal year ending June 30 2012, would not create a hardship because the trust had sufficient assets to fund retiree insurance benefits for "a significant number of years going forward." The EM then stated that the "amount saved in the fiscal year beginning July 1, 2012, by a modification of the collective bargaining agreements obligations of the trust will significantly contribute to the City's ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year beginning June [sic] 1, 2012, and thereafter." The EM concluded his request for authority by noting: "Time is of the essence. The new fiscal year starts July 1, 2012. In order to have maximum impact on the 2012/2013 fiscal year given the time frames of the notice Trustees of this action, I urge prompt consideration for this request."

The State Treasurer responded to the EM's July 10, 2012 letter in a letter dated July 16, 2012. In his letter, the State Treasurer outlined the "general economic problem" facing the city. The State Treasurer also reviewed the requirements of § 19(1)(k) of PA 4 to "reject, modify, or terminate one or more terms and conditions of an existing collective bargaining agreement." The State Treasurer also found with respect to the EM's request that the four conditions of MCL 141.1519(1)(k) had been satisfied. The State Treasurer approved the proposed modification without stating to which fiscal year it would commence but stated that the changes "can save the City approximately \$3.9 million annually"

The EM issued Executive Order 225 on August 1, 2012, providing that it “have immediate effect.” On August 8, 2012, plaintiff filed its complaint alleging, with respect to defendant’s failure to pay its actuarially required contribution to the trust, in Count II, a violation of Const 1963, art 9, § 24; in Count IV, a violation of an ordinance; and in Count VI, breach of contract. Plaintiff only challenged defendant’s failure to pay its required contribution to the Trust for the fiscal year July 1, 2011 through June 30, 2012. The other counts in plaintiff’s complaint related to defendant’s failure pay its required contribution to the Pontiac Police and Fire Retirement System. On March 21, 2013, the parties stipulated to dismissing these claims, apparently because the claims had been settled.

On March 6, 2013, defendant moved for summary disposition. In relevant part, defendant argued that Count II was meritless because our Supreme Court held in *Studier*, 472 Mich 642, that Const 1963, art 9, § 24 does not apply to healthcare benefits. Defendant argued that Count IV was meritless because 2011 PA 4 authorized the emergency manager to amend city ordinances, and Count VI was meritless because 2011 PA 4 authorized the emergency manager to modify an existing collective bargaining agreement.

At the conclusion of the motion hearing, the trial court decided to grant defendant’s motion for summary disposition in accordance with defendant’s legal arguments. On May 14, 2013, the trial court entered its order granting defendant’s motion for summary disposition. Plaintiff now appeals by right.

II. STANDARD OF REVIEW

Although the trial court did not identify under which subrule it granted summary disposition, we review the trial court’s decision under the standard applicable to MCR 2.116(C)(10) “because the trial court’s consideration went beyond the parties’ pleadings.” *Kosmalski v St John’s Lutheran Church*, 261 Mich App 56, 59; 680 NW2d 50 (2004). As with all such motions, we review de novo a trial court’s decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277-278; 681 NW2d 342 (2004). The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Summary disposition may be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.*

The proper interpretation of a contract and the legal effect of one of its clauses are legal questions reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 461, 464; 703 NW2d 23 (2005). When determining the meaning of a contract, a court must assign undefined words in the contract their “plain and ordinary meaning that would be apparent to a reader of the instrument.” *Id.* at 464. A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases as they would appear to a reader of the contract. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). After ascertaining the meaning of a contract’s terms, “a court must construe and apply unambiguous contract provisions as written.”

Rory, 473 Mich at 461. Any other legal questions relating to interpretation of the contracts at issue or pertinent statutes are also reviewed de novo. *Studier*, 472 Mich at 649; *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).

III. ANALYSIS

A. REPEAL OF PA 4

2011 PA 4 was “suspended” on August 8, 2012, by the State Board of Canvassers’ certification of the sufficiency of the referendum petitions regarding the act filed on February 29, 2012. See Const 1963, art 2, § 9; MCL 168.477(2); *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 595 n 3, 598, 619-620; 822 NW2d 159 (2012); OAG, 2011-2012, No. 7267, p 72, 78 (August 6, 2012).² The State Board of Canvassers’ certification on November 26, 2012, of the fall general election results disapproving 2011 PA 4 had the effect of repealing the act and reviving the Local Government Fiscal Responsibility Act, 1990 PA 72, MCL 141.1201 *et seq.*, effective on the suspension of 2011 PA 4. See *Martin v Murray*, ___ Mich App ___; ___ NW2d ___ (Docket No. 319509, January 20, 2015), slip op at 2-3; see also *In re Detroit*, 504 BR 191, 216; 2013 Bankr LEXIS 5120 (Banker ED Mich, 12/5/2013), citing *Davis v Roberts*, unpublished order of the Court of Appeals, entered November 16, 2012 (Docket No. 313297). The revived 1990 PA 72 was repealed and replaced by 2012 PA 436, MCL 141.1541 *et seq.*, effective March 28, 2013. See *Martin*, slip op at 2-3; *In re Detroit*, 504 BR at 216, 250.

The parties do not discuss the effect of the suspension of PA 4 one week following the issuance of Executive Order 225 on August 1, 2012. Their arguments assume, however, that the EM’s actions pursuant to PA 4 before its suspension, provided the actions comport with the act’s terms, remain valid and enforceable. We agree. See *Minty v Bd of State Auditors*, 336 Mich 370, 390-391; 58 NW2d 106 (1953), quoting *Cusick v Feldpausch*, 259 Mich 349; 353; 243 NW 226 (1932), quoting 1 Lewis’ *Sutherland Statutory Construction* (2d ed), § 284:

A law can be repealed by the law-giver; but *the rights which have been acquired under it while it was in force do not thereby cease*. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, *or a legal exemption from a demand made by another*. [Emphasis added; see also *Peters v Goulden*, 27 Mich 171 (1873).]

The legislature has similarly provided that the repeal of a statute will not affect a penalty, forfeiture or liability incurred before the statute’s repeal.

² Opinions of the Attorney General are not binding, but we find OAG, 2011-2012, No. 7267, p 72, 78 (August 6, 2012) persuasive. See *Martin v Murray*, ___ Mich App ___; ___ NW2d ___ (Docket No. 319509, January 20, 2015), slip op at 2, n 2.

The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. [MCL 8.4a.]

Consequently, we conclude that if the EM validly acted pursuant to the authority of 2011 PA 4 to amend existing CBAs such that the terms of trust were modified to remove the city's actuarially required contribution to the trust for the fiscal year ending June 30, 2012, then such action remains valid and enforceable despite the subsequent repeal by referendum of the act.

B. CONST 1963, ART 9, § 24

Count II of plaintiff's complaint alleges a violation of Const 1963, art 9, § 24, which reads in its entirety as follows:

The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

"These two clauses unambiguously prohibit the state and its political subdivisions from diminishing or impairing 'accrued financial benefits,' and require them to fund 'accrued financial benefits' during the fiscal year for which corresponding services are rendered." *Studier*, 472 Mich at 649. But the Court also held that "health care benefits are not 'accrued financial benefits' and, thus, are not protected by Const 1963, art 9, § 24." *Id.* at 670.

Plaintiff does not dispute the holding of *Studier*, but it does argue its claim in the instant case is distinguishable because Article II of the trust reads in relevant part: "The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution." Therefore, plaintiff argues, the plain language of the trust elevates otherwise unprotected health-care benefits to the protection of Const 1963, art 9, § 24. Plaintiff's argument is not premised on the first clause of Const 1963, art 9, § 24; plaintiff asserts that defendant violated the second clause of Const 1963, art 9, § 24 by refusing to fully fund the retirees' future group health-care insurance benefits on an annual basis.

The trial court correctly dismissed this claim. As explained by the Court in *Studier*, the threshold question regarding whether the funding requirement of the second clause of Const 1963, art 9, § 24 applies is whether "accrued financial benefits" are at issue. *Studier*, 472 Mich at 653.

Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits" Thereafter, the second clause seeks to ensure that the state and its political

subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those “financial benefits arising on account of service rendered in each fiscal year” [*Id.* at 654.]

So, because the funding requirement of the second clause of Const 1963, art 9, § 24 only applies to “accrued financial benefits,” and prefunding insurance for future health care benefits are not “accrued financial benefits,” *Studier*, 472 Mich at 654, 670, it follows that the second clause of Const 1963, art 9, § 24 does not apply in this case. Moreover, even if it applied, the second clause of Const 1963, art 9, § 24 does not guarantee any particular method of funding accrued liability of future benefits. *Shelby Twp Police & Fire Ret Bd v Shelby Twp*, 438 Mich 247, 254; 475 NW2d 249 (1991); *Kosa v State Treasurer*, 408 Mich 356, 371-372; 292 NW2d 452 (1980). The trial court correctly concluded that plaintiff’s constitutional claim lacked merit.

C. ORDINANCE VIOLATION

Count IV of plaintiff’s complaint alleges violation of an ordinance. Plaintiff does not identify which ordinance defendant allegedly violated. Rather, plaintiff only cites the provisions of the trust instrument obligating defendant to financially contribute to the trust. Defendant’s alleged violation of these provisions would be properly categorized as breach of contract. “[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.” *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, our research has uncovered no local ordinance concerning health care benefits for retired police and firefighters. Chapter 92 of the Pontiac Municipal Code is titled “Retirement.” The final article, Article IV, §§ 92-101 to 92-125, is titled “Policemen’s and Firemen’s Retirement System.” Article IV apparently governs the PFRS. We are unable to identify any city ordinance governing the trust or health care benefits for retired police and firefighters, nor has plaintiff cited to one. Consequently, we must conclude that the trial court correctly dismissed plaintiff’s claim regarding an ordinance violation with respect to defendant’s funding of the trust.

D. BREACH OF CONTRACT

Count VI of plaintiff’s complaint asserts a claim for breach of contract regarding the actuarial required contribution to the trust for the fiscal year commencing July 1, 2011 through June 30, 2012, which the parties agree was due on or before June 30, 2012. There is no dispute that art III, § 1 of the trust obligates defendant to pay annual contributions to the trust that are determined to be “actuarially necessary” to fund the future health-care benefits of the pertinent retirees as required by the applicable collective bargaining agreements. Indeed, it was this significant ongoing liability that prompted the EM to seek the State Treasurer’s authorization to modify the terms of the trust through the authority of § 19(1)(k) of PA 4, MCL 141.1519(1)(k).

Initially we address whether the EM’s action of issuing EO 225 on August 8, 2012 retroactively eliminates the city’s obligation under the trust and various CBAs that accrued on or before June 30, 2012. On July 1, 2012 the city’s actuarial required contribution to the trust was past due. Consequently, without modification, the city’s obligation to fund the trust was breached on July 1, 2012. See *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458;

761 NW2d 846 (2008) (a breach of contract occurs when a party fails to perform its contractually required duties). We note that although a trust is generally distinguishable from a contract, a promise to place future property in trust may be enforced as a contract right. See 76 Am Jur 2d Trusts § 250, p 309; 2 Restatement Trusts, 3d, § 41, comment c, pp 183-184. Here, reading the trust as whole, the city's obligation to fund the trust flows from the pertinent collective bargaining agreements, and the trust is not an independent contractual obligation. See art I, § 1; art III, § 1(a), cl 2; art V, § 2. As stated in art VII, § 1, "The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, *except as provided by the terms of the Collective Bargaining Agreements* between the collective bargaining association and the City and the terms of this Trust Agreement." (Emphasis added).

At oral argument, the parties disagreed whether the EM could retroactively modify the city's accrued trust liability but otherwise did not cite to pertinent authority to support their respective positions. We agree with defendant's position. Under PA 4, the EM may modify collective bargaining agreements, and, hence, may modify the city's obligation to contribute to the trust. Moreover, the trust itself, art X, § 1 provides it may be "amended at any time" by "collective bargaining" And, after complying with the conditions specified in PA 4, the EM may "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement." MCL 141.1519(1)(k). Because the parties to a collective bargaining agreement could apply its modified terms retroactively, we conclude that the EM also could do so under § 19(1)(k). See *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 326; 550 NW2d 228 (1996): "Generally, parties are free to take from, add to, or modify an existing contract." While a modification would normally require a "meeting of the minds" of the contracting parties, *id.* at 326-327, this requirement is dispensed with where the EM acts pursuant to the authority of § 19(1)(k). Consequently, assuming the EM properly invoked the authority granted by PA 4, the EM could retroactively eliminate the city's actuarial required contribution to the trust for the fiscal year July 1, 2011 through June 30, 2012.

But the question remains whether Executive Order 225, assuming it were properly adopted under the authority of PA 4, did, in fact, eliminate the city's actuarial required contribution to the trust for the fiscal year July 1, 2011 through June 30, 2012. We conclude it did not. The plain language of Executive Order 225 provides that the trust is "amended to remove Article III obligations of the City *to continue to make* contributions to the Trust." (Emphasis added.) The term "continue" means to "go on or keep on without interruption, as in some course or action." *Random House Webster's College Dictionary* (1992). Plainly, the term "continue" relates to present and future action. Further, Executive Order 225 provided it "shall have immediate effect." Because Executive Order 225 was adopted August 1, 2012, given immediate effect and applied to the present of present or future obligations under art III, § 1, by its own terms, it did not apply to the city's already accrued actuarial required contribution to the trust for the already ended fiscal year July 1, 2011 through June 30, 2012.

This plain reading of EO 225 is also supported by the EM's request for concurrence and the State Treasurer's approval of authority granted to the EM to adopt EO 225. In his letter to the State Treasurer of July 10, 2012, after noting the city's article III funding obligation, the EM stated that it was "anticipated that the City will be required by the Trustees of the VEBA to contribute \$3,915,371 *during the fiscal year ending June 30, 2013.*" (Emphasis added.) While the EM also mentioned the city's trust obligation for the fiscal year ending June 30, 2012, he

wrote that the “amount saved *in the fiscal year beginning July 1, 2012*, by a modification of the collective bargaining agreements obligations of the Trust will significantly contribute to the City’s ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year *beginning June [sic] 1, 2012*, and thereafter.” (Emphasis added.) The EM concluded his letter with a request for timely action so as to “have *maximum impact on the 2012/2013 fiscal year . . .*” (Emphasis added.) Thus, although not free of all ambiguity, the July 10, 2012 letter, read as a whole, is a request to amend the city’s trust funding obligation beginning with the fiscal year commencing July 1, 2012.

Similarly, the State Treasurer’s letter of July 16, 2012, determining that the four conditions of MCL 141.1519(1)(k) were satisfied and justified the EM’s proposed action, supports determining that the modification applied to the city’s trust contributions for the fiscal year of July 1, 2012 to June 30, 2013, and thereafter. The State Treasurer, in finding that MCL 141.1519(1)(k)(ii)³ was satisfied, wrote that “[t]he proposed modification of the collective bargaining agreements as to retiree health care contributions to a VEBA is reasonable and necessary” and “changes to language relating to retiree benefits can save the City approximately \$3.9 million annually” The EM’s July 10, 2012 letter referred to a similar amount as the city’s anticipated required contribution to the trust for the fiscal year ending June 30, 2013.

We reverse and remand for further proceedings. We do not retain jurisdiction. No taxable costs are awarded to either party, a public question being involved. MCR 7.219.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood

³ MCL 141.1519(1)(k)(ii) provides: “Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.”

EXHIBIT C

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREE PREFUNDED
GROUP HEALTH AND INSURANCE TRUST,

Plaintiff,

dg
Case No. 12-128625-CZ
Hon. Daniel P. O'Brien

vs.

CITY OF PONTIAC, MICHIGAN,

Defendant.

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Matthew I. Henzi (P57334)
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**PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION AND PLAINTIFF'S REQUEST FOR
SUMMARY DISPOSITION PURSUANT TO MCR 2.116(D)(2)**

NOW COMES PLAINTIFF by and through its attorneys SULLIVAN WARD ASHER &
PATTON, P.C. and requests that this Honorable Court Deny Defendant's Motion for Summary
Disposition; further, that this Honorable Court grant Plaintiff's Request for Summary

SULLIVAN, WARD, ASHER & PATTON, P.C.

Disposition pursuant to MCR 2.116(I)(2).

Respectfully Submitted,

SULLIVAN, WARD, ASHER & PATTON, P.C.

By: /s/ Matthew L. Henzi
Attorney for Plaintiff
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Dated: April 10, 2013

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SULLIVAN, WARD, ASHER & PATTON, P.C.

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREE PREFUNDED
GROUP HEALTH AND INSURANCE TRUST,

Plaintiff,

Case No. 12-128625-CZ
Hon. Daniel P. O'Brien

vs.

CITY OF PONTIAC, MICHIGAN,

Defendant.

SULLIVAN, WARD, ASHER & PATTON, P.C.

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**PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND PLAINTIFF'S
REQUEST FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(1)(2)**

INTRODUCTION

Pontiac owes Plaintiff Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") the sum of 3,473,923.28, plus interest. These amounts owed represent the unpaid balance of Pontiac's required, annual contribution payable to Plaintiff for fiscal year July 1, 2011-June 30, 2012.

Pontiac has paid its annual contribution to Plaintiff for decades, in response to Plaintiff's annual, actuarial valuation report. However, Pontiac failed to pay its annual contribution for fiscal year 2012. This amount was due on or before June 30, 2012. As such, Judgment should enter for Plaintiff.

STATEMENT OF FACTS

A. The Pleadings.

On August 8, 2012, Plaintiff filed its Complaint against Defendant City of Pontiac ("Pontiac").

The Complaint seeks to compel the City to pay \$3,473,923.28 to Plaintiff Police and Fire Retiree Prefunded Group Health and Insurance Trust, ("PF VEBA"). This sum represents the City's unpaid portion of its annual contribution owed to the PF VEBA for fiscal year ending June 30, 2012. The Complaint also seeks the imposition of attorneys' fees and interest on the amount owed. **See Complaint, Exhibit A.**

Pontiac has not paid the annual contributions as sought in the Complaint. Defendant filed its Answer to Complaint and Affirmative Defenses on August 15, 2012. Pontiac did not specifically allege that it was not required to pay its annual contribution to the PF VEBA for fiscal year 2012. Further, Pontiac did not allege that any Executive Order terminated the City's obligation to pay into the PF VEBA.

Plaintiffs are entitled to summary disposition by operation of law.

B. Pontiac's obligation to pay its annual contribution to the PF VEBA.

i. Background re: Trust Creation

The City established by Ordinance the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") to provide health, optical and dental life insurance

SULLIVAN, WARD, ASHER & PATTON, P.C.

benefits for retirees who are members of the PFRS and who retired from the City on or after August 22, 1996. The City and the Trustees are the settlors to this Trust, which was created in 1996. The Trust is qualified under the Internal Revenue Code. See Trust, **Exhibit B**.

The Trust was created, much like in other communities, so that the City could obtain certain tax benefits and obtain a more favorable bond rating while pre-funding retiree health care for police officers and fire fighters who retired after August 22, 1996, as well as their spouses and dependents. The unions who bargained on behalf of the Police and Fire employees at the time the Trust was created received a benefit in that the Trust was a mechanism that would pre-fund retiree health care, invest those funds and exist to ensure that retiree health care benefits would be paid in perpetuity.

The Trust Agreement required the City to fund 100% of health care benefits to those eligible under the Trust, at a specific level of coverage. The City was also obligated to provide dental, hearing, vision and life insurance coverage. *Id.*

Presently, the PF VEBA Trust has over \$31 million dollars in assets. The City is required to pay an annual contribution to the PF VEBA Trust, according to an actuarial valuation report. See June 8, 2011 actuarial valuation report as **Exhibit C**. The City failed to make its annual contribution to the PF VEBA for the fiscal year ending June 30, 2011 and fiscal year ending June 30, 2012.

Plaintiff filed suit against the City for its failure to pay its FY 2011 contribution. The case, 2011-121551-CZ, was assigned to Honorable Leo Bowman. After protracted litigation, the City paid \$3,243,232.17, or the City's annual contribution, as required by the actuarial valuation report for FY 2011.

ii. Applicable Trust Language

Importantly, the Trust Agreement states as follows:

...the City notes the cost savings involved with respect to the history regarding this proposal." Page 1, **Exhibit B**.

The City was required to make contributions, defined as

"the payment required to be made to the Trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan. Section 3, page 2-3, **Exhibit B**.

The City-Employer shall be required to pay to the Trust Funds such amounts as the Trustees may determine or actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the actuary for the Trust to result in a prefunded plan. Article III, Section 1. Page 6-7, *Id*.

The Trust also states:

The purpose of this Trust Fund known as the "City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust" is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan established in accordance with the terms of the Trust Fund. The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution. Section 1 page 4. (Emphasis added). *Id*.

This Trust...is created for the exclusive purpose of providing ...group health and hospitalization and dental and optical insurance in accordance with the Collective Bargaining Agreements between the City and applicable police and fire collective bargaining associations. Section 3, Page 5. *Id*.

The Trust described herein shall be irrevocable...Section 4, page 6. *Id*.

The Trustees shall carry out the purposes of this Trust Agreement and may maintain any health benefit programs and insurance policy or policies now or in force and effect and available to police and fire retirees of the City of Pontiac or may substitute other comparable or

superior policies in lieu thereof. Article V, Section 2 page 12. (Emphasis added). Id.

The Trustees shall have the right and duty to enforce payment of all contributions provided for in the Collective Bargaining Agreement and the performance of all obligations provided in this Trust. Article V, Section 4, page 13. (Emphasis added). Id.

The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, except as provided by the terms of the Collective Bargaining Agreements between the collective bargaining associations and the City and the terms of this Trust Agreement. Article VII, Section 1, page 22. Id.

C. The Amount Owed by the City to the PF VEBA.

According to its consistent practice, the Trustees of each Board hired an actuarial firm to prepare the annual actuarial valuation for the PF VEBA.

The actuary computed the City's required contribution to the PF VEBA Trust to be \$4,381,269.00, or 44.65% of valuation payroll. See pp 2-3 of **Exhibit C**. Plaintiffs have calculated this sum, based on payroll data from the City, to be \$3,473,923.28. The payroll was calculated in the same manner as stated above, based on the City's outsourcing of police and fire personnel during the subject fiscal year.

Plaintiffs sent written demand to the City on July 9, 2012, demanding payment. The City did not respond.

D. Executive Order 225

Pontiac's motion claims it is not obligated to pay into the PF Veba pursuant to Executive Order 225, which became effective August 1, 2012. Executive order 225 purports to unilaterally amend the VEBA Trust so that the City is no longer required to make an annual contribution, as determined by an actuary, to the Police and Fire VEBA Trust. See Executive Order 225, **Exhibit D**.

Plaintiff believes that the Emergency Manager is precluded by law from unilaterally amending the Trust Document.

Plaintiff also believes that this Executive Order violates the terms of the Trust and is not permitted by the Emergency Manager Law in effect at the time the executive orders were issued, known as Public Act 4.

Plaintiff also believes this executive order cannot be applied retroactively to extinguish a debt owed by the City and that was past due before the order was entered.

Plaintiff now moves for summary disposition since there is no genuine issue of material fact that would preclude this Court from entering judgment in favor of Plaintiffs.

LAW AND ARGUMENT

I. THE CITY IS OBLIGATED TO PAY PLAINTIFF PURSUANT TO TRUST AND ORDINANCE

A. Controlling Standards of Law

The City codified its PF VEBA Trust Agreement as an Ordinance. The City is obligated to make annual contributions for certain health care benefits for eligible participants according to the terms of the Ordinance. The Ordinance requires the City to make certain contributions to the Trust, as follows:

Article 1, Section 3: Contributions - The term "contributions" as used herein, shall be mean the payment required to be made to the trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing collective bargaining agreements or any future collective bargaining agreements for the purpose of providing group health hospitalization and dental and optical and group life insurance for employees, retirees, and beneficiaries covered by the Plan. See pp 2-3, See Exhibit B.

See also, Article 3, Section 1. See pp 6-7 of Exhibit B.

Further, the Trust permits the Trustees to compel and enforce payments of contributions as follows:

Article 3, Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this trust fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the trust and the providing of benefits under various insurance programs. See pp 7-8, **Exhibit B**.

Further, the Ordinance obligates the City to pay the Trust's attorney's fees for the instant suit, as follows:

Article 3, Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the collective bargaining agreement and the performance of all obligations provided in this Trust. ...in a suit or action brought by the Trustees commenced pursuant to this section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees. See pg 8, **Exhibit B**.

B. Application of Law – PF VEBA

The Ordinance clearly required the City to make all appropriate contributions owed to ensure the payment for health care expenses incurred by eligible retirees. The City violated the Ordinance by failing to pay its entire annual contribution for fiscal year 2011-2012. Summary disposition is appropriate and judgment should enter against Defendant in the amount of the unpaid balance.

II. DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA CONSTITUTES A BREACH OF ITS CONTRACT WITH PLAINTIFFS

A. Controlling Standards of Law

An unambiguous contractual provision reflects the parties' intent as a matter of law and "if the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Prods & Concepts Co.* 469 Mich at 375. Thus, Court's may not impose an ambiguity on clear contract language, *Grosse Pointe Park v Mich Muni Liab & Prop Pool* 473 Mich 188, 198 (2005).

The language of the PF VEBA Ordinance/Trust document evidence that the City is obligated to pay all sums due and owing through the City's annual contribution for fiscal year 2011-2012 to ensure that Plaintiff can pay retiree health care benefits to police and fire employees through the City's annual contribution for fiscal year 2011-2012.

B. Application of Law

The City's breach of this contract has caused significant damages to Plaintiff. Most significantly, the failure to pay negatively affects the Systems' fund to liability ratio and creates an unfunded liability. In short, the non-payment ensures that Plaintiffs could not meet their health care benefit obligations as of today's date. Summary disposition in favor of Plaintiff is appropriate.

III. DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA VIOLATES MICHIGAN'S CONSTITUTION.

A. Controlling Standards of Law

Any accrued financial benefits of a public retirement system pension plan are, by constitutional mandate stated in Const. 1963, Article XI, Section 24, a contractual obligation

that cannot be diminished or impaired. This section of the Constitution requires that benefits arising out of account of service rendered in each year be funded during that year.

Michigan's Const. Article 9 §24 provides as follows:

Public Pension Plans and Retirement Systems. Obligation. The accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits, annual funding. **Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year** and such funding shall not be used for financing unfunded accrued liabilities. (Emphasis added).

The Trust expressly states that all benefits paid by the City are constitutionally protected. The Trust provides as follows:

Article 2. Establishment of Trust, Section 1:

The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan establishing in accordance with the terms of the Trust Fund. **The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution.**

(Emphasis added) See pg 5 of Trust, **Exhibit B.**

B. Application of Law

The City failed to pay its annual contribution to the PF VEBA for fiscal year July 1, 2011 – June 30, 2012. The City's failure to pay its employer contribution to the PF VEBA is a violation of Article 9 Section 24 of Michigan's constitution. The annual contribution was calculated to be 44.65% of payroll, or \$3,473,923.28. That requirement was communicated to

the City, which did not pay the balance owed. Summary disposition is appropriate since Plaintiffs are entitled to a judgment in this amount.

C. **Defendant's Reliance on Studier is Misplaced - Executive Order 225 is Unlawful Since it Violates Michigan's Constitution and Breaches an Express Contract**

Defendant's reliance on *Studier v. Michigan Public Schools Retirement Board* 472 Mich. 642 (2005) is misplaced. In *Studier*, the Supreme Court examined a statutorily created retirement system. In *Studier*, there was no contractual promise to provide a certain level of health benefits. The Court went on to hold that Michigan's legislatures are free to enact laws that contradict what was done by a prior legislature. Therefore, one legislature's reduction in previously determined health benefits did not violate Michigan's Constitution. If the *Studier* matter involved the contractual promise to provide benefits, like here, the matter would likely have been decided differently.

In the instant matter, the VEBA Trust expressly provides that health care benefits are intended to be constitutionally protected benefits. See pg. 4, **Exhibit B**. There is a contractual promise to provide a level of benefits to police and fire retirees who are eligible for the VEBA. In fact, the Trust and Collective Bargaining Agreements expressly state that different types of policies could be obtained, but they must be comparable or superior to what was provided in 1996.

Therefore, *Studier* is of no help to Defendant. The health care benefits are constitutionally protected because there was a contractual promise to make them so.

In fact, the *Studier* opinion supports Plaintiff's argument that the benefits are constitutionally protected. In *Studier*, the Court held that in order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable

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construction than the legislature intended to be bound to a contract. *Id.* at 662. The *Studier* Court noted that historically, courts were reluctant to infer a contractual obligation on legislation. The Court noted that this reluctance is grounded in the realization that it is easy enough for a statute explicitly to authorize a contract or say explicitly that the benefits are contractual promises...*Id.* at 663.

The *Studier* Court noted that the statutory language did not contain plain language indicating that the legislature intended to be bound by a contract. For example, the legislature did not use contractual terms like contract, covenant or vested rights. *Id.* at 663-664. Further, the legislature did not adopt a policy requiring a particular health plan nor did it preclude a particular health plan. *Id.* at 664. Also, the legislature did not authorize a plan containing specific deductibles and co-pays. Further, the statute did not provide that any changes would only apply to a specific class or group of retirees. *Id.* at 665. Thus, the *Studier* Court held that because there was an absence of clear and unequivocal language showing an intent to contract, the Court would not disturb a legislature's amendment of the retirement system's statute. *Id.* at 665.

In the instant matter, the opposite facts exist. There is a contract which clearly and unequivocally evidences an intent to contract and to provide those benefits as if they were constitutionally protected. The Trust incorporates CBAs which do specify prescription costs, co-pays, deductibles and the types of coverage to be provided. In short, the analysis in *Studier* requires this Court to find that the City of Pontiac contracted with VEBA eligible retirees and agreed to provide a certain level of benefits.

Furthermore, even if the health care benefits were not constitutionally protected, they were certain protected by the terms of the Trust, specifically language that guaranteed these

benefits as constitutionally protected. Defendant has set forth no rationale for how an emergency manager could breach a trust, codified as an ordinance, when his predecessors promised to provide a certain level of benefits. Clearly, these Executive Orders breach that contractual promise and violate the Ordinance which codifies that contract.

IV. EXECUTIVE ORDER 225 VIOLATES THE EMERGENCY MANAGER LAW -P.A. 4

A. Executive Order 225 is not temporary and it singles out one class of employees

MCL 141.1519 set forth the powers of an emergency manager. This provision exists within what is collectively referred to as PA 4, the Emergency Manager Law. This law was suspended on August 8, 2012 when a requisite number of signatures to place the issue on a ballot referendum were obtained. Michigan's voters then voted to repeal Public Act 4. Michigan's legislature subsequently revised the Act, now known as PA 436, which is scheduled to become effective approximately April 1, 2013.

The enumerated powers of an emergency manager permit the modification of an existing collective bargaining agreement under several conditions. One of these conditions is that the modification must be temporary and does not target specific classes of employees. These orders are clearly not temporary. MCL 141.1519(K)(4). The orders are not limited in scope and will exist in perpetuity. Additionally, the amendment violates the Emergency Manager Act because it is "(1) not temporary; and (2) is directed at a specific class of employees." The Executive Order 225 specifically states that its intent is to stop paying the City's annual contribution into the VEBA Trust for several years. This is the opposite of temporary. Further, it applies only to those retirees who retired after August 22, 1996, a specific class of employees. The Executive Orders only apply to those police and fire retirees who are eligible for the VEBA. The VEBA-eligible members constitute one portion of the

police and fire retirees. Clearly, the Emergency Manager singled out these individuals by terminating payment into the PF VEBA.

B. Executive Order 225 should not be applied retroactively

The City's annual contribution to the PF VEBA for fiscal year 2012 was due no later than June 30, 2012. On July 1, 2012, the amount was past due. On August 1, 2012, the Emergency Manager issued Executive Order 225 and is now arguing that this Order terminates the City's obligation to pay into the VEBA Trust. This Executive Order should not be applied retroactively. The Emergency Manager should not be permitted to retroactively extinguish an existing, and past due, debt through an Executive Order.

MCL 141.1519 sets forth the enumerated powers of an emergency manager. Admittedly, the emergency manager has the ability to reject or modify a contract. MCL 141.1519(1)(k). Further, the emergency manager can enter into agreements with creditors. MCL 141.1519(1)(w).

However, Defendants are unaware of any precedent giving an emergency manager authority to retroactively extinguish a debt. Although there are few reported cases on this relatively new topic, all of the cases found by Plaintiff's counsel involve situations where an emergency manager issued an executive order modifying a contract on a prospective basis. In *NCO Acquisition LLC v Snyder*, 2012 U.S. Dist. LEXIS 141725, a property manager challenged an emergency manager's modification of lease agreements. The modification was conditional (it gave the emergency manager the authority to terminate a lease early, if he so chose subsequent to entry of the order) and was applied on prospective basis.

In *Welch v Brown* 2013 U.S. Dist. LEXIS 45681 (March 29, 2013), the parties litigated the Flint emergency manager's modification of collective bargaining agreements which would

have reduced retiree health care benefits. The Court entered an injunction which stopped these prospective changes to retiree health care.

In *City of Pontiac Retired Employees v City of Pontiac* 2012 U.S. Dist. LEXIS 98858 (July 17, 2012), a group of retirees challenged the Pontiac emergency manager's modification of collective bargaining agreements which would reduce health care on a prospective basis.

There is no language within case law precedent or Public Act 4 which suggests that an emergency manager can issue executive orders which terminate debt. However, this is exactly what the City is attempting to do in this matter. If, hypothetically, the waste management contractor for the City of Pontiac was owed a sum of money pursuant to contract, and the City issued an executive order terminating the City's obligation to pay that contract, such an executive order would not pass muster. PA 4 provides many tools for an emergency manager to fix the finances of a municipality or school district. However, it does not give the power to "erase" past due debts.

CONCLUSION

WHEREFORE, Plaintiff respectfully request that this Honorable Court deny Defendant's motion for summary disposition; further, that this Honorable Court grant its

Motion for Summary Disposition pursuant to MCR 2.116 (I)(2) and enter Judgment in favor of the PF VEBA in the amount of \$3,473,923.28;

Respectfully submitted,

SULLIVAN, WARD, ASHER & PATTON, P.C.

By: /s/Matthew I. Henzi
Attorney for Plaintiffs
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075-1000
(248) 746-0700
mhenzi@swapp.com

Dated: April 10, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2013, my secretary, Laura Kimmell, electronically filed the Plaintiff's Response to Defendant's Motion for Summary Disposition, Brief in Support and this Certificate of Service with the Clerk of the Court using the WIZNET system which will send notification of such filing to counsel of record.

By: /s/Matthew I. Henzi
MATTHEW I. HENZI (P57334)
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(248) 746-0700
mhenzi@swapp.com

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EXHIBIT A

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**

BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREMENT SYSTEM,
and BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREE PREFUNDED
GROUP HEALTH AND INSURANCE TRUST,

Plaintiffs,

Case No. 12- 128625 -CZ
Hon. JUDGE DP O'BRIEN

vs.

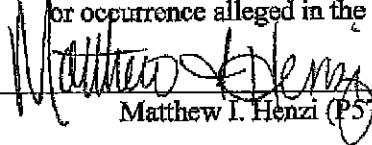
CITY OF PONTIAC, MICHIGAN,

Defendant.

Anthony A. Asher (P10273)
Matthew I. Henzi (P57334)
Sullivan, Ward, Asher & Patton, P.C.
Attorneys for Plaintiffs
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COMPLAINT

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the Complaint.


Matthew I. Henzi (P57334)

NOW COME Plaintiffs, by and through their attorneys, Sullivan, Ward, Asher & Patton, P.C., and for their Complaint against Defendant, state as follows:

VENUE AND JURISDICTION

1. Defendant, City of Pontiac, Michigan (the "City"), is a municipal entity, incorporated under the Home Rule City Act, MCL 117.1 *et seq.*, located in Oakland County, Michigan and is organized under the Home Rule City Act, MCL 117.1 *et seq.*

2. The City sponsors the City of Pontiac Police and Fire Retirement System ("PFRS"), an ordinance based governmental defined benefit retirement plan, recognized by the Internal Revenue Code as a qualified trust under IRC section 401(a). PFRS provides retirement benefits for all police and fire employees of the City. The PFRS is located in Pontiac, Michigan.

3. The PFRS is administered by a five-member Board of Trustees, as specified by City Ordinance. The Board of Trustees delegates routine administrative matters to its Retirement System Administrator and her staff comprised of 3 individuals.

4. The City has also established by ordinance The City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust (the "Trust") to provide health, optical, dental, and life insurance benefits for retirees who are members of the PFRS and who retired from the City on or after August 22, 1996. The Trust was created as an Internal Revenue Code 501(c)(9) as a (VEBA). The Trust is located in Pontiac, Michigan.

5. The Trust is administered by a five-member Board of Trustees, as specified by City Ordinance.

6. Venue is appropriate in Oakland County pursuant to MCL 600.1615.

7. The amount in controversy exceeds \$25,000.00, exclusive of costs, interest, and attorney fees.

FACTUAL ALLEGATIONS - PFRS

8. The PFRS is a governmental plan under Internal Revenue Code 414 and was established by ordinance, as last amended in 2007 and as codified on the City's website as Chapter 92 of the City's Ordinance Code.

9. The PFRS is governed by the State of Michigan's constitution, *Const. 1963, Art. 9, §24*, which provides that:

The accrued financial benefits of each pension plan and retirement system of a state in its political subdivision shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits, annual funding.

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

10. Under this section of the constitution, the People of the State of Michigan have imposed a duty upon the City to fund, during any fiscal year, financial benefits arising under the PFRS on account of services rendered in that year.

11. The PFRS is also governed by Public Act 314, the Public Employee Retirement System Investment Act, MCL 38.1132 et. seq. ("PA 314")

12. The PFRS System is a trust fund, separate and distinct from the City, and the assets of the System shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the System. MCL 38.1133(6).

13. Section MCL 38.1140(m) of PA 314 requires the City to annually contribute the "actuarially determined contribution amount." The contribution amount is defined as follows:

... the required employer contribution is the actuarially determined contribution amount. An annual required employer contribution in a plan under this Act shall consist of a current

service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability. (Emphases added).

14. According to MCL 38.1140(m), the trustees of the PFRS have the sole responsibility and authority in hiring an actuary and determining the required employer contribution that the City must make annually.

15. In addition to the funding requirements of the Michigan Constitution and PA 314, the PFRS Ordinance requires member contributions, the amount of which is determined by collective bargaining between the members' unions and the City and City contributions in an amount which will be sufficient to provide for the benefits earned during the year of service. The Ordinance further requires the City to contribute those costs as determined necessary according to an actuarial valuation. See Section 92-114 of the Ordinance.

16. On October 19, 2010, Sandra W. Rodwan, EA, MAAA, FCA, President of Rodwan Consulting Company ("Rodwan"), the actuarial consulting firm for the PFRS, prepared the Annual Actuarial Valuation for the PFRS as of December 31, 2009. The actuarial report is not attached since it is in the possession of the City and its attorneys.

17. The purpose of the actuarial valuation was to:

- A. compute the liabilities associated with benefits likely to be paid on behalf of current, retired, active, vested, inactive members of the Retirement System;
- B. Compare accrued assets with accrued liabilities to assess the funded condition of the Retirement System, and
- C. Compute the City's required contribution rate for the fiscal year beginning July 1, 2011.

18. The actuary, using actuarial assumptions previously approved by the Board of Trustees and the actuary, computed the City's required contribution for the fiscal year beginning on July 1, 2011 to be \$1,527,193.00, or 20.62% of valuation payroll.

19. The Actuarial Valuation assumes that the City's required contribution will be paid to PFRS in two semi-annual payments, the first in December and the second in June. The contribution, when calculated by the actuary, is reduced to account for the anticipated interest that the December payment will accrue during the six month period prior to the end of the fiscal year. Because the City failed to make any contributions for fiscal year July 1, 2011 - June 30, 2012, the City's required contribution must be increased by a percentage determined by the actuary for each day the payment is received after its due date to account for lost interest.

20. The City is currently in receivership under Michigan Public Act 4 of 2011. As such, the State has appointed an Emergency Manager to control the finances of the City.

21. The Trustees of the PFRS are fiduciaries, pursuant to statute, ordinance, and bylaws and are to discharge their fiduciary duty solely in the interest of the participants and the beneficiaries of the PFRS.

22. The Trustees of the PFRS have a statutory duty, pursuant to MCL 38.1140(m), to confirm that the City paid its required employer contribution according to statute.

23. On July 9, 2012, Plaintiffs, through their counsel, sent written demand to the Emergency Manager, through his counsel, for payment of all required City contributions for the PFRS and the Trust. The total due from the City to PFRS is \$1,333,070.30. This amount was calculated based the percentage of actual payroll, for police and fire employees for the month of July 2011. From August 1, 2011-December 31, 2011, this amount was calculated based on the percentage of actual payroll of fire employees, only. From January 1, 2012-June 30, 2012,

the amount calculated was based on a pro rata share of the hard dollar figure calculated by the actuary, stated in paragraph 18, above.

24. The City did not respond to the request. Further, the City's Emergency Manager has published statements indicating the city will not pay these contributions. As such, Plaintiffs file this lawsuit to compel the City's employer contribution to the PFRS for all applicable periods.

FACTUAL ALLEGATIONS - THE TRUST

25. The Trust was created on August 22, 1996. The settlors to the Trust include the City and the Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Plan. A copy of the Trust is not attached to this Complaint since it is in the possession of the City and its attorneys.

26. The Trustees of the Trust are fiduciaries and are required to discharge their fiduciary duty in the sole interest of the participants and beneficiaries of the Trust.

27. The Trust requires the City to make certain contributions to the Trust, as follows:

Section 3: Contributions - The term "contributions" as used herein, shall be mean the payment required to be made to the trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing collective bargaining agreements or any future collective bargaining agreements for the purpose of providing group health hospitalization and dental and optical and group life insurance for employees, retirees, and beneficiaries covered by the Plan.

Pages 2-3 of Trust.

28. The Trust permits the Trustees to compel and enforce payment of payments of contributions and that time is of the essence as to all payments to the Trust, as follows:

Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this trust fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the trust and the providing of benefits under various insurance programs.

Pages 7-8 of Trust.

29. The Trust obligates the City to pay the Trust's attorneys' fees for the instant suit, as follows:

Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the collective bargaining agreement and the performance of all obligations provided in this Trust. ...in a suit or action brought by the Trustees commenced pursuant to this section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees.

30. The City intended that the benefits provided by the Trust would be constitutionally protected, as follows:

Article 2. Establishment of Trust, Section 1:

The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan establishing in accordance with the terms of the Trust Fund. The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution.

(Emphasis added. Page 5 of Trust.)

31. The Trust exists for the exclusive purpose of providing through policies issued by duly licensed commercial insurance companies, through a fund of self-insurance or through

any other lawful means of providing insurance, group health and hospitalization, dental and optical insurance in accordance with collective bargaining agreements between the City and applicable Police and Fire Collective Bargaining Associations, for the benefit of their Police and Fire retirants and beneficiaries who are eligible to participate in accordance with the Plan.

32. The City is required to pay to the Trust Fund "such amounts as the trustees may determine are actuarially certified and are actuarially necessary to fund the trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the actuary for the Trust to result in a pre-funded plan. Page 6-7 of Trust.

33. On June 8, 2011, Sandra Rodwan, EA, MAA, FCA, President of Rodwan Consulting Company ("Rodwan"), the actuarial consulting firm for the Trust prepared the annual actuarial valuation for the Trust as of December 31, 2009. The actuarial report is not attached since it is in the possession of the City and its attorneys.

34. The actuary, using actuarial assumptions previously approved by the Board of Trustees in the actuary, computed the City's required contribution for the fiscal year beginning on July 1, 2011 to be \$4,381,269.00, or 44.65% of valuation payroll.

35. On July 9, 2012, the Trustees of the Trust sent written demand to the Emergency Manager, through his attorney, for payment of the City's required contributions for the PFRS and the Trust. The total due from the City to the Trust is \$3,473,923.28. This amount was calculated based on the percentage of actual payroll, using the percentage rate calculated by the actuary. The amount was calculated in July 2011 based on actual payroll of fire and police employees during July 2011. From August 1, 2011-December 31, 2011, the amount was based on actual payroll of fire employees, only, because there were no police employees. From

January 1, 2012 through June 30, 2012, the amount was calculated based on a pro rata share of the hard dollar figure calculated by the actuary, stated in paragraph 34, above.

36. The City did not respond to the request. Further, the City's Emergency Manager has published statements indicating the city will not pay these contributions. As such, Plaintiffs file this lawsuit to compel the City's employer contribution to the Trust for all applicable periods.

COUNT I - VIOLATION OF MICHIGAN CONSTITUTION - PFRS

37. Any accrued financial benefits of a public retirement system pension plan are, by Constitutional mandate through Const. 1963, Article 9, §24, a contractual obligation which cannot be diminished or impaired.

38. This section of the Constitution also requires that benefits arising on account of service rendered in each year be funded during that year.

39. The Trustees of the PFRS have the sole authority to calculate the City's pension contribution.

40. The City has failed to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012. Further, the City has indicated that it does not intend to make this contribution.

41. The City's failure to pay its employer contribution to the PFRS is a violation of Article 9, §24 of Michigan's Constitution.

42. This court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

43. An actual controversy exists between Plaintiffs and Defendant that can only be determined by an adjudication in the nature of a declaratory judgment as provided by law and court rule.

44. The City's violation of Constitution's 1963 Article 9, §24 is a failure to honor its contractual obligation, which cannot be diminished or impaired by the City.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated Article 9, §24 of the Michigan Constitution of 1963 by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT II - VIOLATION OF MICHIGAN CONSTITUTION - THE TRUST

45. By entering into the Trust, the City expressly indicated its intent that benefits provided under the Trust were statutorily mandated and that the City had a contractual obligation to pay its contribution on an annual basis to the Trust and that this obligation could not be diminished or impaired by the actions of its officials or governing body.

46. Any accrued financial benefits of a public retirement system pension plan are, by Constitutional mandate through Const. 1963, Article 9, §24, a contractual obligation which cannot be diminished or impaired.

47. This section of the Constitution also requires that benefits arising on account of service rendered in each year be funded during that year.

48. The Trustees of Trust have the sole authority to calculate the City's pension contribution.

49. The City has failed to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012. Further, the City has indicated that it does not intend to make this contribution.

50. The City's failure to pay its employer contribution to the Trust is a violation of Article 9, §24 of Michigan's Constitution.

51. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

52. An actual controversy exists between Plaintiffs and Defendant that can only be determined by an adjudication in the nature of a declaratory judgment as provided by law and court rule.

53. The City's violation of Constitution's 1963 Article 9, §24 is a failure to honor its contractual obligation, which cannot be diminished or impaired by the City.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated Article 9, §24 of the Michigan Constitution of 1963 by failing to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

**COUNT III - VIOLATION OF PUBLIC EMPLOYEE RETIREMENT SYSTEM
INVESTMENT ACT, MCL 38.1132 ET. SEQ., PA 314 - PFRS**

54. MCL 38.1140(m) required the City to make its annual contribution to the PFRS and that the contributions shall consist of the current service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability.

55. The Trustees of the PFRS have the sole responsibility and authority to determine the City's annual contribution.

56. The City's failure to pay its annual contribution for fiscal year July 1, 2011 - June 30, 2012 is a violation of the above-cited statute.

57. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

58. An actual controversy exists between Plaintiffs and Defendant that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated the Public Employee Retirement System Investment Act, MCL 38.1132 et. seq., Public Act 314, by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT IV- VIOLATION OF ORDINANCE AND BREACH OF TRUST - THE TRUST

59. The City created a Trust Agreement and adopted it as an ordinance, and therefore became obligated to make annual contributions for certain health care benefits for eligible participants according to the terms of the Trust/Ordinance.

60. The terms of the Trust/Ordinance indicate that the City intended the benefits to be constitutionally mandated and that the obligation for the City to make its contribution could not be diminished or impaired.

61. The City has failed to timely make its contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012 and has further indicated that it will not make this contribution.

62. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

63. An actual controversy exists between Plaintiffs and Defendant that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated its Ordinance by failing to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT V - VIOLATION OF ORDINANCE AND BREACH OF TRUST- PFRS

64. The City created a Trust which was adopted pursuant to the PFRS Retirement Ordinance, codified within Chapter 92 of the City's Ordinance Code. As such, the City is required to make annual contributions to the PFRS.

65. The City has failed to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012 and has indicated that it will not make the contribution.

66. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

67. An actual controversy exists between Plaintiffs and Defendants that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated the PFRS Retirement Ordinance, codified within Chapter 92 of the City's Ordinance Code by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT VI - BREACH OF CONTRACT - TRUST AND PFRS

68. The City has failed to pay its annual required contributions to the Trust and the PFRS in violation of its obligations pursuant to contract with Plaintiffs.

SULLIVAN, WARD, ASHER & PATTON, P.C.

69. Based on the above-described omissions and breaches of the contract between the parties, the City has caused Plaintiffs to suffer substantial and irreparable damage.

70. Pursuant to contract between the parties, the City is required to pay its annual contributions to the PFRS and the Trust.

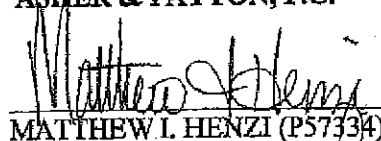
71. The City has breached the terms and conditions of its contract thereby causing irreparable damage to Plaintiffs.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to together with costs, interest, and attorneys' fees.

Respectfully submitted,

SULLIVAN, WARD,
ASHER & PATTON, P.C.

By:


MATTHEW L. HENZI (P57334)
Attorney for Plaintiffs
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075-8412
(248) 746-0700

Dated: August 8, 2012
W1181864/PPR/115999

EXHIBIT B

**DECLARATION OF TRUST AND AGREEMENT OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH
AND INSURANCE PLAN**

AUGUST 22, 1996

THIS DECLARATION OF TRUST AND AGREEMENT OF THE CITY OF PONTIAC, MICHIGAN POLICE AND FIRE PREFUNDED RETIREE GROUP HEALTH AND INSURANCE PLAN is made and entered into this 22nd day of August, 1996, by the CITY OF PONTIAC, MICHIGAN (hereinafter "City") and the Trustees of the CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE PLAN ("Plan") and any successor Trustees.

WHEREAS, the City is desirous of establishing a prefunded group health and insurance plan for certain retired Police Officers and Firefighters represented by applicable Police and Fire collective bargaining associations, and

WHEREAS, certain collective bargaining associations and the City have entered into separate Collective Bargaining Agreements which include certain health and life insurance benefits, (including dental and optical benefits), and

WHEREAS, the parties are desirous of establishing this declaration of trust and agreement for the purposes of creating and maintaining a Trust Fund which will conform to all applicable federal statutes and regulations, state and local laws,

WHEREAS, the City notes the cost savings involved with respect to the history regarding this proposal.

NOW, THEREFORE, the parties agree that the "Declaration of Trust and Agreement" of the (City of Pontiac, Michigan Police and Fire Retirees Prefunded

Group Health Plan) is hereby established to provide funding for health, optical, and dental insurance and life benefits for retirees of the Police and Fire Departments of the City of Pontiac who were members of the Police and Fire Retirement System of the City of Pontiac who retired on or after August 22, 1996.

ARTICLE 1

Definitions

The following definitions shall govern the following terms when used in this Agreement, unless otherwise specifically required by the context.

~~Section 1: Administrator~~ - The person, persons, firm, corporation or insurance company or companies, appointed by the Trustees to administer the Trust. The Administrator shall be responsible for the day today operations of the Trust who shall carry out the directives of the Trustees and who shall report and act consistent with the directives of the Chairman of the Board of Trustees as to any matters which require direction between meetings of the Board of Trustees.

Section 2: Collective Bargaining Agreements - The term Collective Bargaining Agreements as used herein, shall mean any written agreement, supplemental agreement, memorandum of understanding, final arbitrator's decision, judicial decision or decision of any public board or agency, by and between applicable Police and Fire collective bargaining associations and the City, and in any amendments, continuations, or renewals, which require the City or any other entity to make payments into group life, health and hospitalization insurance and dental and optical programs for employees represented by the applicable Police and Fire Retirement System of the City of Pontiac.

Section 3: Contributions - The term Contributions as used herein, shall mean the payment required to be made to the Trustees and to the Trust Fund by the City under the authority such as ordinance or City Council resolution or under any

applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan.

Section 4: Participant - The term Participant as used herein, shall mean any person meeting all of the following requirements:

- (1)(A) who was a sworn employee of the Police Department or uniform employee of the Fire Department of the City of Pontiac and who was a member of the Police and Fire Retirement System of the City of Pontiac and who was a member of one of the collective bargaining associations which has negotiated to participate in this Trust, immediately prior to retirement with benefits from the Police and Fire Retirement system of the City of Pontiac.
- (B) who retired with a service retirement or a duty disability retirement or a non-duty disability retirement on or after August 22, 1996, and
- (C) who in the case of a service retiree or non-duty disability retiree obtained at least ten (10) years of service credit in the Police and Fire Retirement System of the City of Pontiac by actual service as a Police Officer or Firefighter for the City of Pontiac excluding any other type of service credit such as military service credit, Reciprocal Retirement Act service credit, etc.
- (D) who was a sworn employee of the Police Department or employee of the Fire Department of the City of Pontiac and who was a member of the Police and Fire Retirement System of the City of Pontiac who was not eligible (pursuant to applicable law) to be a member of one of the three collective bargaining associations which has negotiated to participate in this Trust immediately prior to retirement with benefits from the Police and Fire Retirement System of the City of Pontiac.

or

(2)(A) The spouse and

(B) any minor children during the period as provided by the Plan at the time of the Participant's (as defined above) retirement from the City of Pontiac and subject to any collective bargaining provisions.

and shall be in accordance with the resolutions and decisions of the Trustees, so long as the allowance by the Trustees of any such persons to participate in the Plan is not prohibited by the insurance laws and regulations of the State of Michigan, the United States Internal Revenue Code, any applicable federal law, and the rules, regulations and court decisions governing those statutes.

Section 5: "Employer" or "City" shall mean the City of Pontiac, Michigan.

Section 6: Plan or Plans - The term Plan or Plans as used herein, shall mean the Plan or Plans, programs, methods and procedures for providing the health, dental, optical and life insurance benefits contemplated herein for the making of regular contributions to the Trustees of the Trust Fund, as the payment by the Trustees of benefits from the Trust Fund, or the securing of benefits from the Plan, in accordance with the rules and regulations relating to eligibility requirements, amount in computation of benefits, and the general administration and operation of the Trust Fund, as the Trustees may, from time to time, adopt in any amendments to this Trust Agreement or modifications thereof. The Plan shall be the City of Pontiac Police and Fire Retiree Prefunded Health and Insurance Plan, effective August 22, 1996, a copy of which is attached hereto.

Section 7: Insurer - Any duly authorized commercial insurance company which may insure any of the beneficiaries of this Trust.

Section 8: Trustees - The term Trustees as used herein, shall mean the Trustees nominated and appointed and successor Trustees designated in the manner provided in this Declaration of Trust.

Section 9: Collective Bargaining Associations - Collective Bargaining Associations are those of the following associations which have negotiated to participate in this Trust:

Pontiac Firefighters Union, Local 376 ("PFFU")

Pontiac Police Officers Association ("PPOA")

Pontiac Police Supervisor's Association ("PPSA")

ARTICLE II

Establishment of Trust

Section 1: The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan established in accordance with the terms of the Trust Fund. The Grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution.

Section 2: The principal office and site of the Trust Fund shall be 450 Wide Track Drive, East, Pontiac, Michigan 48342. The Trustees shall have the power to move the principal office of the Trust to another location and to establish other offices, as they deem necessary.

Section 3: This Trust is created as an Internal Revenue Code 501(c)9 Trust (VEBA) and is created ~~for the exclusive purpose of providing through policies~~ issued by duly licensed commercial insurance companies, through a fund of self-insurance, or through any other lawful means of providing insurance, group health and hospitalization and dental and optical insurance ~~in accordance with the Collective Bargaining Agreements between the City and applicable Police and Fire~~ collective bargaining associations, for the benefit of their Police and Fire retirants and beneficiaries who are eligible to participate in accordance with the Plan for

such insurance benefits under the rules and regulations established by the Trustees, pursuant to the provisions of the Collective Bargaining Agreements.

Section 4: The Trust described herein shall be irrevocable and shall conform to all applicable sections of the Internal Revenue Code, the Collective Bargaining Agreements requiring payments to the Trust Fund, the Statement of Purposes set forth in this Trust Agreement, and all statutes, ordinances, rules, regulations, arbitrators' awards and judicial decisions interpreting the foregoing provisions.

Section 5: The Trust Fund shall consist of City-Employer contributions, any contributions which may be paid by Participants and beneficiaries due to retirees electing additional coverage than that provided by the City per collective bargaining, all investments made or held under Trust, and all income therefrom, both received and accrued, and any other property, which may be received or held by reason of this Trust.

Section 6: No part of the net earnings of the Trust may inure to the benefit of any Participant or beneficiary other than by benefit payments or for services provided to the Trustees in their administration of this Trust. A portion of net earnings may be used for payment for reasonable and necessary professional services and costs and expenses related to assist the Trustees and Administrator in the operation of the Trust. The Trustees shall determine what costs, fees and professional services are reasonable and necessary.

ARTICLE III

Contributions to the Trust Fund

Section 1: (a) The City-Employer shall be required to pay to the Trust Fund such amounts as the Trustees may determine are actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan

consistent with actuarial valuations and calculations made by the Actuary for the Trust to result in a Prefunded Plan.

Such contributions shall also be made in accordance with the Collective Bargaining Agreements between the collective bargaining associations and the employer City and this Trust Agreement, and such other regulations of the Board of Trustees as are not inconsistent with the aforesaid authority.

(b) In addition to the amounts paid by the City on behalf of Participants as set forth above and in the Collective Bargaining Agreements, the City shall contribute to the Trust Fund such additional moneys which together with those contributions and return on investments shall be sufficient to fund the benefits provided on a sound actuarial basis. Participants shall contribute those amounts required for additional extended Family Riders in effect as of 8-22-96 and otherwise as determined by the Trustees.

(c) In the event that such authority or the Collective Bargaining Agreements do not set forth the time and place of payments, the manner of such payments, the procedures and forms to accompany said payments, and in the event these matters are not set forth in this Trust Agreement, then the Trustees may in their discretion decide the time, manner and means of payments, the procedures to be followed in making the payments, and the forms required to accompany said payments to said Trustees. Upon determination by the Trustees of these matters, the Trustees shall provide written notice to the City and to the collective bargaining associations and require payments by the employer City to be made pursuant to said rules and regulations.

Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this Trust Fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the Trust and the providing of benefits under various insurance programs.

Section 4: Nothing contained herein shall be deemed to modify or limit in any way the rights that the parties to the Collective Bargaining Agreements may have, any supplements or memoranda thereto, or any arbitrator's award to enforce collection of any amounts due to this Trust Fund, including the right of the parties to sue for same.

ARTICLE IV

Trustees

Section 1: The Fund shall be administered by five (5) Trustees as follows:

Mayor of the City of Pontiac
 Finance Director of the City of Pontiac
 Firefighter Trustee of the City of Pontiac
 Police Officer Trustee of the City of Pontiac
 A person unanimously selected by the above four Trustees
~~Said fifth Trustee may also be a Participant of the Trust.~~

Each Trustee shall be a fiduciary and have fiduciary responsibilities under applicable law and shall act prudently and in the best interests of the Trust.

Section 2: The Trustees who are hereby appointed as Trustees of the Trust are listed below:

The five (5) Trustees are:

1. Walter L. Moore
2. Hasnukh K. Dahya
3. Lon G. Britton
4. Craig Storum

5. (The Trustee selected by the above four Trustees)

The above named Trustees individually accept their appointment as Trustees under this Declaration of Trust and Agreement and consent to act as Trustees hereunder until they or their successors are designated as provided in this Agreement, and they declare and agree that they will receive and hold the Trust Fund as Trustees by virtue of the terms, conditions and provisions of this Trust Agreement and for the purposes, uses and trusts and with the powers and duties herein set forth.

Section 3: These five (5) Trustees, as designated, shall sign this Trust Agreement and their signature shall constitute acceptance of office in agreement to act under and be subject to the terms and conditions of this Trust Agreement.

Section 4: Prior to the commencement of their duties, the Trustees shall select a Chairperson and a Secretary from the group of then existing Trustees and the Chairperson and Secretary shall serve a term of one (1) year or until a new Chairperson and Secretary is elected.

Section 5: In the event of the absence of the Chairperson and the Secretary from the meeting, the Trustees shall designate another Trustee as acting Chairperson and/or acting Secretary until his or her return.

Section 6: Term of Trustees:

- (1) The term of the Mayor of the City of Pontiac shall be identical to his or her term of office.
- (2) The term of the finance Director of the City Pontiac shall be identical to his term of holding the position of Finance Director.
- (3) The term of the Firefighter Trustee shall be identical to the term said Fighter serves as a Trustee of the Police and Fire Retirement System of the City of Pontiac.

- (4) The term of the Police Officer Trustee shall be identical to the term said Officer serves as a Trustee of the Police and Fire Retirement System of the City of Pontiac.
- (5) The term of the fifth Trustee shall be a three year term. The initial fifth Trustee shall serve until December 31, 1997. The fifth Trustee may be removed by unanimous vote of the first four Trustees, i.e. Mayor, Finance Director, Firefighter, and Police Officer.

Section 7: The fifth Trustee may resign at any time and be discharged from duties and liabilities under this Trust Agreement by giving at least thirty (30) days written notice to the remaining Trustees. A successor fifth Trustee shall be appointed by unanimous vote of the first four Trustees. Any successor Trustee appointed under the terms of this Agreement shall, upon appointment, and without further act, deed or conveyance, succeed to all the rights, duties, titles, and powers, of every type and description of his or her predecessor.

Section 8: Each Trustee shall serve until the expiration of his/her term of office or until his or her death, incapacity, resignation or removal.

Section 9: A vacancy or vacancies in the office of the Trustees shall not impair the powers of the remaining Trustees to administer the affairs of the Trust, provided there are sufficient Trustees to constitute a quorum as herein provided. Three (3) Trustees shall constitute a quorum.

Section 10: All decisions shall be made by at least three (3) affirmative votes.

Section 11: The Trustees shall meet at least once quarterly. The Trustees shall determine the time for the regular meetings of the Trustees and the place or places where such meetings shall be held. The Secretary of the Trustees or his designee, shall be responsible for giving notice of the time and place of such

meetings to the other Trustees. Special meetings of the Trustees may be held at the call of the Chairperson, the Secretary, or any two (2) Trustees upon five (5) days written notice to each Trustee. Special meetings of the Trustees may also be held at any time, without notice, if all Trustees consent in writing thereto. Notice of all meetings of the Trustees, both regular and special, shall be given to the City and to the collective bargaining associations.

ARTICLE V

Powers and Duties of the Trustees

Section 1: The Trustees shall hold all the powers of Trustees that are necessary to carry out the purposes of this Trust and are generally available to Trustees under the laws of the State of Michigan, except as limited by this Trust and by federal law. It is intended that this Trust shall be tax exempt and shall qualify under the Internal Revenue Code, particularly Section 501(c)(9), and any amendments of the Code applicable to plans of this type. The Trustees shall have the continuing power and duty to amend the Trust to the extent it becomes necessary to qualify said Trust under the Internal Revenue Code and to continue the tax exempt status of the Trust Fund. The Trustees shall take no action nor make any determination inconsistent with any qualification or ruling of the Internal Revenue Service, an arbitrator or the courts with respect to this Trust Fund. In the case of amendments to the Internal Revenue Code or changes of regulations by the Internal Revenue Service or the Labor Department, the Trustees are empowered to take all necessary action to continue the qualifications of this Plan as a qualified Plan and to continue its contributions to it as tax-free deductions. The Trustees are also authorized to take all necessary action to maintain the Plan in compliance with applicable federal law. The Trustees shall

have exclusive responsibility for the investment, management and control of Trust assets.

Section 2: ~~The Trustees shall carry out the purposes of this Trust Agreement and may maintain any health benefit programs and insurance policy or policies now in force and effect and available to Police and Fire retirees of the City of Pontiac or may substitute other comparable or superior policies in lieu thereof.~~ In providing group life insurance to the Participants of this Plan so as to effectuate the purposes of this Trust Agreement, ~~the Trustees shall be bound by the terms of this Trust Agreement and any applicable Collective Bargaining Agreements~~ between the City and the collective bargaining associations and shall comply with all applicable laws.

Section 3: In carrying out the purposes of this Trust Agreement, ~~the Trustees may maintain group health and hospitalization, optical, and dental insurance policy or policies now in force and in effect during the time period that the Participant was an active employee or may substitute other comparable or superior policies in lieu thereof.~~ In providing group health and hospitalization benefits to the Participants of this Plan so as to effectuate the purposes of this Trust Agreement, the Trustees shall be bound by the terms of this Trust Agreement and the Collective Bargaining Agreements between the City and the collective bargaining associations and shall comply with all applicable laws. In addition to, or in lieu of, policies of insurance obtained through commercial or other companies, the Trustees may, consistent with the laws of the State of Michigan, adopt a self-insurance Trust Fund. The Trustees may arrange for a continuation of the present arrangements regarding the providing of benefit coverage by the employer through the employer's self-insured arrangement and all existing policies between the City and applicable insurance carriers.

Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of Participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the Collective Bargaining Agreement and the performance of all obligations provided in this Trust. The Trustees shall immediately notify the City, the collective bargaining associations, and the Administrator of a delinquency, mistake or discrepancy in any report or contribution. In a suit or action brought by the Trustees commenced pursuant to this Section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees. Delay by the Trustees in bringing this suit to recover delinquent contributions from the City shall not be considered a waiver of any of the rights reserved to the Trust.

Section 5: The Trustees, in accordance with the requirements of law, may, upon their own initiative or upon the City becoming delinquent, direct an impartial firm of independent certified public accountants to act as agent of the Trustees at any reasonable time during business hours, to enter upon the premises of the City which is a signatory to a Collective Bargaining Agreement requiring contributions to this Trust or is otherwise obligated to remit funds to the VEBA Trust and to examine only the payroll records, papers and reports pertaining thereto as may be necessary to determine the moneys due on behalf of a Participant covered by this Trust and to make a written report to the Trustees, with an identical copy to the City. This procedure is to insure that the Trustees can fully ascertain whether the City is making full payments to the Trust, as required by anyone or all of the Collective Bargaining Agreements, and any amendment thereto, court decisions or arbitration awards.

Reports required by this Section shall be confidential and released only to the Trustees and the City, except to the extent that disclosure would be otherwise required by law.

Section 6: Notice given to all parties shall, unless otherwise specified, be sufficient if in writing and delivered or sent by prepaid first class mail or prepaid telegram or mailgram. Except as otherwise noted, the distribution or delivery of any statements or documents required under this Agreement shall be sufficient if delivered in person or prepaid first class mail.

Section 7: (a) The Trustees shall maintain proper books of accounts and records of administration of the Trust, including written records of all meetings.

(b) The Trustees shall compile and furnish to each individual Trustee all records which they individually or collectively require to properly discharge their duties. The books of accounts and records of administration of the Trust, including the minutes of all meetings, shall be available for inspection at the permanent office of the Trust during reasonable business hours by the City, by the collective bargaining associations, or any Participant covered by this Agreement.

(c) The Trustees shall make available to the collective bargaining associations information relating to contributions from the City, pursuant to the respective Collective Bargaining Agreements and the status of coverage of their covered Participants.

(d) The City shall be entitled to receive from the Trustees records pertaining to their contributions and any Participant shall be entitled to receive records of the Trustees relating to the activities of the Trust.

Section 8: The Trustees shall cause an annual audit to be made of the Fund by a firm of independent certified public accountants, and copies of such audit

shall be furnished to the parties hereto and a copy shall be made available at the principal office of the Trust for inspection by interested persons. Such audit shall contain a summary of the assets and liabilities of the Plan, a resume of the operations for the preceding year, together with such other data as the Trustees request or is required by law.

Section 9: The Trustees shall make reports to and file such information with the Internal Revenue Service, or any other appropriate public authority as may be required by state or federal law.

Section 10: A written instrument signed by the trustees shall be evidence of the action of the Trustees. Whenever the signature of a Trustee is required on any document, signature of the Chairperson or acting Chairperson and Secretary or acting Secretary shall be required, unless such authority has been delegated to an individual Trustee pursuant to the provisions hereof; and as to any person doing business with the Trustees, any such instrument so signed shall be conclusively presumed to be authentic and all facts and matters stated therein shall be conclusively presumed to be true and said persons may rely on such instrument for all purposes.

Section 11: The Trustees may assign or allocate specific responsibilities or duties among the Trustees, or appoint committees for the purpose of overseeing any activity or pursuing or investigating any activity or transactions in which the Trustees are interested. The Trustee or committee of Trustees may be assigned the responsibility to take action without prior approval by the remainder of the Board. Any such action taken under such circumstances shall be valid, proper and not a breach of fiduciary responsibility of the Trustee or committee so appointed and so acting. The Trustees may rely on the report the individual Trustee or committee of Trustees who prepared the report or recommended the action which was undertaken by the full Board after receiving the report of the Trustee or committee

of Trustees. No Trustee shall be liable for the acts of any Trustee or committee of Trustees under these circumstances because of any act or omission on the part of the Trustee or committee of Trustees to whom such responsibilities, obligations or duties have been assigned or allocated, unless he/she participates with the knowledge that such act or omission is a breach of fiduciary responsibility or if he/she has knowledge of a breach by such other fiduciary without making reasonable efforts under the circumstances to remedy the breach.

Section 12: In the event of any suit brought against the Trustees arising out of the acts within the scope and powers and duties of the Trustees, or in the event of any lawsuit brought by the Trustees as authorized herein, the cost of the defense or prosecution of such lawsuit shall be charged to the Trust Fund, and shall be paid directly from the Trust Fund, provided such costs are not incurred by reason of bad faith, gross negligence, or breach of a fiduciary obligation to the Trust Fund or to the beneficiaries thereof.

Section 13: All income, profits, recoveries, contributions, forfeitures, and any and all moneys, securities and properties of any kind at any time received or held by the Trustees hereunder, shall become part of this Trust Fund when received, and shall be held for the uses and purposes hereof.

Section 14: The Trust Fund may cause the Trustees, or any person, firm, or organization with which it deals who has fiduciary responsibilities under this Trust Agreement or under that person's, firm's, or organization's arrangement with the Board of Trustees, to be bonded in an amount not less than ten percent (10%) of the funds handled, but in no event in excess of five hundred thousand dollars (\$500,000.00), unless an amount over and above that is prescribed by state or federal law. The corporation providing such bond shall meet applicable federal, state, and local standards. The cost of said bond shall be borne by the Trust Fund.

Section 15: The Trustees may authorize the purchase of insurance for the Trust Fund and for the Trustees to cover liability or losses occurring by reason of an act or omission (errors or omissions) of a fiduciary, including the Trustees, providing, however, that such insurance policy permits recourse by the insured against the fiduciary, including the Trustee or Trustees involved; in case of breach of fiduciary obligation by such fiduciary.

Section 16: The Trustees may employ such clerical personnel or administrative personnel to perform whatever administrative activities are required in the proper performance of the Trust. In addition thereto, the Trustees may, if they desire, contract with an administrator to perform such clerical and administrative duties as they may, in their discretion, determine is reasonable and prudently necessary to carry out the Trust Fund's activities and purposes. The administrator so appointed, or with whom the contract was made, may be assigned the activities of receiving the City's reports, entering the information of those reports on permanent records, maintaining such records, receiving contributions from the City and/or on behalf of Participants in the form of checks or drafts solely for the purpose of forwarding the contributions to the Trustees' bank accounts, preparation of governmental reports, furnishing reports required by law to Participants, the preparation of checks for the payment of obligations of the Trustees, and all related activities and other activities necessary to help administer the Trust Fund. The Trustees are further authorized to enter into contracts with such administrator for the administration of said Plan or Plans and Trust Fund for whatever periods, in their discretion, the said Trustees deem advisable. The Trustees shall be entitled to rely on the reports and recommendations of said administrator or any actions taken by said administrator with the authority granted him/her. The Trustees shall be responsible for any act taken with respect to the appointment, designation, retention, discharge, or employment of such

administrator which is taken prudently and in good faith. Under no circumstances shall said administrator have control or authority with respect to the management of the Plan of Plans or its assets. The said administrator shall not be clothed with any type of authority or power which will constitute the administrator and a fiduciary with an administrator to perform such clerical and administrative duties as they may, in their discretion, determine is reasonable and prudently necessary to carry out the Trust Fund's activities and purposes. The administrator so appointed, or with whom the contract was made, may be assigned the activities of receiving the City's reports, entering the information of those reports on permanent record, maintaining such records, receiving contributions from the City and/or on behalf of Participants in the form of checks or drafts solely for the purpose of forwarding the contributions to the Trustees' bank accounts, preparation of governmental reports, furnishing reports required by law to Participants, the preparation of checks for the payment of obligations of the Trustees, and all related activities and other activities necessary to help administer the Trust Fund. The Trustees are further authorized to enter into contracts with such administrator for the administration of said Plan or Plans and Trust Fund for whatever periods, in their discretion, the said Trustees deem advisable. The Trustees shall be entitled to rely on the reports and recommendations of said administrator or any actions taken by said administrator with the authority granted him/her. The Trustees shall not be responsible for any act taken with respect to the appointment, designation, retention, discharge, or reemployment of such administrator which is taken prudently and in good faith. Under no circumstances shall said administrator have control or authority with respect to the management of the Plan or Plans or its assets. The said administrator shall be clothed with any type of authority or power which will constitute the administrator as a fiduciary. Said administrator will not have the power or authority to act as an investment counselor or manager and will not be

authorized to furnish investment advice. The administrator will not be clothed with the discretion to act in any way with respect to the Plans or management or its assets. In the event of the administrator's discharge, the Trustees shall require the said administrator to return all necessary books, records, and documents in the possession of said administrator which are necessary for the proper administration, handling, and operation of this Trust. If the Trustees have appointed, employed, hired, or contracted with an administrator, a provision to this effect shall be incorporated in the written agreement between the Trustees and administrator. The Trustees may, in their discretion, assign certain administrative duties to the City; provided, however, that the direction and management of such activities shall be within the exclusive control of the Trustees.

Section 17: The Trustees shall employ an independent certified public accountant or licensed public accountant who is not providing services to either the employer or any of the collective bargaining associations. Said accountant shall be employed to perform the services as may be required by the Trustees. The Trustees shall cause the Fund to be audited at least once each year.

Section 18: The Trustees shall be authorized to appoint (an) investment manager(s) to manage the assets of the Plan. Such investment manager(s) must be registered under the Investment Advisor's Act of 1940 and must meet any applicable state and federal requirements to act as investment manager. Such appointment may include the power to acquire and dispose of the assets of the Plan; provided, however, that if any state or federal agency promulgates any rules with respect to limitation of liability on the part of the Trustees in choosing an investment manager or counselor, then the Trustees shall follow said regulations to the extent that they can maximize the protection available to them.

Section 19: If the Trustees choose an investment manager or investment counselor, they may enter into a written agreement with said investment manager

or investment counselor or bank or insurance company, if such institutions act in such capacity, which will provide for the investment or reinvestment of the assets of the Trust Fund; and upon such execution, the Trustees may convey, if it is so provided, to such investment manager, investment counselor, bank or insurance company, any assets of the Trust Fund so that said investment manager or counselor may engage in such transactions which are legal for trust funds in the State of Michigan and in the United States and which are prudent for the Trustees to undertake. The Trustees shall not be liable for the acts or omissions of such investment manager, investment counselor, bank or insurance company or under any obligation to invest or otherwise manage the assets of a Plan or Plans, which assets are subject to the management of such investment manager, investment counselor, bank or insurance company.

The Trustees may, if they deem proper in their discretion, or if the circumstances require it, appoint such investment manager, managers, banks or insurance companies as fiduciaries and enter into an agreement with such institution, naming it a fiduciary and conveying to such fiduciary all or a portion of the assets of the Trust Fund, so that said fiduciary may handle, manage and hold those assets conveyed to it. All assets conveyed to said fiduciary shall be subject to the provision of the agreement or agreements between the Trustees and the fiduciary.

Section 20: The Trustees may employ legal counsel with whom they may seek advice, consult with, require attendance at Trustees meeting and to represent the Trustees whenever necessary, including the preparation of any documents, legal or otherwise, which may have any legal consequences. In choosing said counsel, the Trustees may, with prudence, give consideration to the developed skills and expertise of the attorney and experience and reputation he/she has achieved.

The Trustees may rely upon the opinion of such counsel so chosen in respect to any action taken or suffered by the Trustees hereunder in good faith, in accordance with the opinion of said counsel, and the Trustees shall not be liable therefore.

ARTICLE VI

Trustee Compensation

The Trustee shall not receive any compensation for performing any services for the Trust. Each Trustee shall be reimbursed for any expenses properly and actually incurred in the performance of his/her duties to the Trust. Included in such reasonable expenses properly and actually incurred in the performance of services to this Trust is the attendance at educational meetings and seminars organized and designed to instruct the Trustees in the proper performance of their duties as Trustees and fiduciaries and to instruct, familiarize and acquaint the Trustees with all the provisions of all applicable laws. Included in such reasonable costs and expenses will be per diem allowance, costs and travel expenses, lodging and food expenses and other reasonable and necessary expenses involved in the participation of such educational conferences conducted and carried out for the purposes expressed herein. The Trustees may further authorize any of the experts who they may retain, including administrators, insurance experts, actuaries, auditors, accountants, attorneys or others, to attend such educational conferences for the purpose of becoming informed of any new developments or for the purpose of keeping current as to the developments in their proper area of expertise. The Trustees are authorized to pay such persons the cost of attending such meetings and/or compensation as the person would ordinarily earn representing the Trustees and familiarizing themselves with the developments in their area of expertise for the purpose of properly serving the Board of Trustees. Any Trustee who is

actively employed as a Police Officer or Firefighter for the City shall be permitted attendance at any and all functions of the Trust, including travel to educational programs and seminars without loss of pay, benefits, or status.

ARTICLE VII

Liabilities of the Parties

Section 1: The City shall not be liable for payment to the Trust of any amounts other than those required of it by this Trust Agreement or any applicable Collectible Bargaining Agreement. The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, except as provided by the terms of the Collective Bargaining Agreements between the collective bargaining association and the City and the terms of this Trust Agreement. Neither the collective bargaining associations, the City, nor any Participant or Trustee shall be liable for any debts, liabilities, or obligations of the Trust except as set forth in the Collective Bargaining Agreements or this Trust Agreement. Neither the City nor any Participant shall have any right to return of any money properly paid into the Trust Fund, except as otherwise specifically provided herein, or to money improperly paid which has already been invested or distributed. Any contribution improperly paid into the Trust Fund by the City or on behalf of a Participant shall be returned by the Trustees upon the request of the City or the Participant or upon discovery by the Trustees that such moneys have been improperly paid into the Trust Fund, unless those moneys have already been invested or distributed.

Section 2: No part of the Fund or any benefits payable by the Trustees shall be subject to alienation, sale, transfer, assignment, pledge, or encumbrance charge by any person. No Participant shall be entitled to receive any part of the contributions made by the City or required to be made by the Trust, in lieu of such

benefits provided under the Plan as determined by the Trustees in accordance with this Agreement.

ARTICLE VIII

Claims Procedure

The Trustees shall provide adequate notice to any Participant or beneficiary whose claims for benefits under this Plan have been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the Participant. Further, the Trustees shall afford a reasonable opportunity to any Participant whose claim for benefits has been denied for a full and fair review of the decision denying the claim. The Trustees shall have the authority to promulgate rules setting forth the precise conduct of any such claims procedure.

ARTICLE IX

Termination of the Trust

Section 1: Subject to the limitations herein, the parties hereby contemplate that new Collective Bargaining Agreements may be entered into from time to time continuing the provisions for the City and Participant contributions to this Trust Fund. This Trust shall continue during such period of time as may be necessary to carry out the provisions of the Collective Bargaining Agreement requiring payment to the Trust and the fact that such Collective Bargaining Agreements are not extended shall not by itself terminate this Trust, which shall continue for a period of time sufficient to wind up the affairs of the Trust.

Section 2: Provided there are no longer any Participants eligible for benefits from the Trust Fund, this Trust may be terminated at any time by the Trustees or their successors in office who are signatories hereto by the execution of an instrument in writing, so long as the termination is not inconsistent with the

then existing Collective Bargaining Agreement. It shall not be necessary for the City or the collective bargaining associations to execute such an agreement for the Trust to terminate.

Section 3: This Trust shall terminate in any case upon the death of the last survivor of such persons who are living at the time of its creation or entitled to receive benefits hereunder, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, this Trust may continue in perpetuity, unless otherwise terminated.

Section 4: If this Trust shall terminate, the Trustees shall forthwith notify any insurance carrier or carriers then providing insurance to Participants in the Fund.

Section 5: In the event of the termination of this Trust, the remaining funds available after providing for all the outstanding obligations, shall be used in a manner as will, in the opinion of the Trustees, best effectuate the purposes of this Trust, including, but not limited to, the purchase of insurance benefits.

ARTICLE X

Amendments

Section 1: The provisions of this Declaration of Trust and Agreement may be amended at any time, by (A) collective bargaining between the collective bargaining associations identified in Article 1, Section 8 and the City of Pontiac (B) by a unanimous vote of the five (5) Trustees, concurred in by the City Council of the City of Pontiac provided, however, that such Amendments are not inconsistent with any applicable Collective Bargaining Agreements and do not adversely affect the tax exempt status of the 501(c)9 Trust. Except as otherwise provided in this Trust Agreement, the Trustees shall have no power in amending

the provision of this Trust Agreement with respect to the amount of contributions required of the City.

Section 2: In addition, the Trustees shall not have the power to adopt any Amendments to this Trust Agreement which:

- (a) alters the basic purposes of this Trust, as set forth herein or divests any Participant or beneficiary of any rights which have already vested and to which they have already become entitled to and for sums of money which they are entitled to receive then or in the future; or
- (b) conflicts with any applicable law or government regulation; or
- (c) causes the use or diversion of any part of the Fund for purposes other than those generally authorized herein,
- (d) with respect to applicable Collective Bargaining Agreement, conflicts with any applicable Collective Bargaining Agreements.

Section 3: Despite any provision to the contrary above, or which may be inconsistent herewith, the Trustees may amend and shall have the duty to amend this Agreement to comply with any rule or regulation of the Internal Revenue Service for qualification under the Internal Revenue Code, continuation of tax exemptions of the Trust and for the deductibility of contributions made by the City under applicable Sections of the Internal Revenue Code or to obtain a favorable determination letter from the Internal Revenue Service. In the event any Amendment is made, a copy of such Amendment bearing requisite signatures of the Trustees, shall be sent to all parties in interest to the Trust Fund as that term is defined by law.

ARTICLE XI

Rule Making Powers

Consistent with the terms of the provisions of state and federal law, the Trustees shall have the power to promulgate rules and regulations for the day to day management of the Trust, the investment of moneys held by the Trust, the establishment of eligibility and benefit levels, to determine all questions regarding the interpretation of the Trust, and such other subjects as shall be deemed necessary and proper by the Trustees. All such rules and regulations shall be reduced to writing and shall be kept in the permanent office of the Trust and available for inspection by the City, the collective bargaining associations and the Participants. Any such rule or regulation promulgated by the Trustees shall be adopted, repealed, or amended by an affirmative vote of four (4) of the Trustees. If any rule or regulation of the Trust is found to be in conflict with any Collective Bargaining Agreement, law, statute, judicial decision, arbitration decision, or any other competent body or tribunal, such rule or regulation shall be deemed voided and, all other rules and regulations of the Trust shall remain in full force and effect. The City, the collective bargaining associations, and the Participants shall be given appropriate notice of all pending rule making meetings and all such parties shall be afforded an opportunity to be heard at said meetings.

ARTICLE XII

Execution

This Agreement and Declaration of Trust shall become effective as of the date it is executed.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be signed and/or executed by duly authorized officers in the City of Pontiac, Michigan and the Trustees, as of the day and year first above written.

Signed, sealed and delivered CITY OF PONTIAC, MICHIGAN in the presence
of:

Pamela Hopkins 4/30/97
RETIREMENT SYSTEMS COORDINATOR

By: Walter Moore
Mayor

By: H. K. Dahya
Finance Director

TRUSTEES:

Walter Moore
Craig L. Storum
H. K. Dahya
Craig L. Storum

1. WALTER MOORE
2. LON G. BRITTON
3. HASMUKH K. DAHYA
4. CRAIG STORUM
5. _____

EXHIBIT C

June 8, 2011

The Police Fire VEBA Board
City of Pontiac
47450 Woodward
Pontiac, Michigan 48342

Dear Board Members:

This report contains the results of an actuarial valuation of the liabilities associated with retiree health benefits provided by the City of Pontiac Voluntary Employee Benefit Association (VEBA) for Police and Fire Employees, together with computed contributions to systematically finance these benefits.

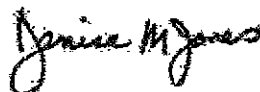
The date of the valuation was December 31, 2009.

The purpose of the actuarial valuation is to:

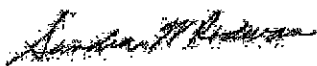
- Compute the liabilities associated with post-employment health and life insurance benefits likely to be paid on behalf of current retired, inactive vested and active employees, and
- Compute a pre-funding contribution rate for the City to finance post-employment health and life insurance benefits as they accrue.

This valuation has been conducted in accordance with generally accepted actuarial principles and practices. Data concerning active members, retirees and beneficiaries was provided by the City. This data has been reviewed for reasonableness, but no attempt has been made to audit such information. This valuation was prepared under the supervision of a Member of the American Academy of Actuaries who meets the qualification standards of the American Academy of Actuaries to render the actuarial opinions contained herein.

Respectfully submitted,



Denise M. Jones
Senior Consultant



Sandra W. Rodwan
Member, American Academy of Actuaries

City of Pontiac
Police and Fire Employees' VEBA

Actuarial Valuation as of December 31, 2009

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Section One:

Valuation Summary

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*Section One: Valuation Summary***Purpose of Valuation**

The purpose of the annual actuarial valuation of the City of Pontiac Police and Fire Employees post-employment health benefits as of December 31, 2009 is to:

- ❖ Compute the liabilities associated with post-employment health and life insurance benefits likely to be paid on behalf of current retired, inactive vested and active participants,
- ❖ Compute a pre-funding contribution rate to finance the benefits as they accrue.

Assumptions Used in the Valuation

The liabilities and pre-funding contribution rate are very sensitive to the long-term assumptions used in making the valuation. The assumptions used in making this valuation, summarized in Section Four, are only one reasonable set out of a large number of possibilities. To the extent that actual experience differs from the long-term assumptions, the liabilities and contribution rates will be greater or less than those indicated in this report. The assumptions having the greatest impact are the rate of medical care inflation and the investment return rate. We have assumed a 10.0% annual increase for medical care inflation in the first year, decreasing in increments of 0.5% over the next 12 years to the ultimate 4.0% assumption. The assumed investment return rate was 7.50%. Please refer to Comments 2 and 3 on pages 4 and 5. Liabilities and computed contributions can change significantly in future years depending upon the actual and assumed rates of medical care inflation, investment return, benefit provisions and demographics of the participant group.

Actuarial Accrued Liabilities

Accrued liabilities of the post-employment health benefits as of December 31, 2009, were computed to be \$86,822,202. Of this amount, \$24,105,965 was attributable to current active employees, \$4,979,005 was attributable to inactive vested participants and \$57,737,232 was attributable to current retirees.

Funding Value of Assets

As of December 31, 2009 the funding value of assets was computed to be \$32,313,276. The market value of assets was reported to be \$26,702,462.

Section One: Valuation Summary

Computed Annual Required Contribution Rate

The contribution rate in accordance with the current funding policy was computed to be 44.65%. This rate is expected to provide, in combination with plan assets, full payment of promised benefits through 2059. The Annual Required Contribution (ARC) shown on page 3, expressed as a percent of payroll is 59.16%. This is the accounting charge to fully fund the benefits promised to the members through this plan year. There are two components of this rate, the normal cost and an amortization payment for unfunded actuarial accrued liability. The normal cost contribution rate was computed to be 20.46% of active payroll. The amortization payment was computed to be 38.70% of active payroll. The amortization period used was 30 years. The 30 year period is the maximum permitted for reporting purposes under Statements 43 and 45 of the Governmental Accounting Standards Board.

Contributing at the rate of 44.65% under the current funding policy would be less than fully funding the ARC. If the City continues to fund under the current funding policy, the GASB ARC would need to be recalculated at a lower interest rate to reflect partial funding.

Participants

	12/31/2009	12/31/2008
Active Employees	138	169
Active Participant Payroll	\$7,405,796	\$9,749,807
Retirees	177	136
Inactive Vested Participants	23	20

Post-Retirement Health Care Rates

Data was submitted concerning the health care rates for current individual retirees together with schedules of the applicable rates for the various coverage plans for retirees.

To illustrate, the average monthly premium rate reported as of December 31, 2009 for one-person coverage was \$703.29 including optical and dental. For two-person coverage the average monthly premium rate reported was \$1,292.42 including optical and dental. The average monthly premium reported for family coverage was \$1,934.05.



Section Two:

***Actuarial Calculations –
Funding***



RODWAN
consulting
company

Section Two: Actuarial Calculations -- Funding

Actuarial Accrued Liabilities

The actuarial accrued liabilities as of December 31, 2009 were computed to be the following:

	<u>12/31/2009</u>	<u>12/31/2008</u>
Active participants	\$24,105,965	\$31,522,586
Vested inactive participants	4,979,005	4,387,432
Retirees and beneficiaries	57,737,232	40,662,793
Total	86,822,202	76,572,812
Less: Valuation Assets	32,313,276	31,405,001
Unfunded Actuarial Accrued Liabilities	\$54,508,926	\$45,167,811
Funded Ratio	37.2%	41.0%

**Computed Annual Required Contribution (ARC) –
Fiscal Year Beginning July 1, 2011**

The computed contribution rate consists of two components: normal cost and amortization of unfunded actuarial accrued liability. Normal cost was computed to be a level percent of payroll from date of hire to date of termination. The normal cost can be considered to be the ongoing cost of the Plan.

The portion of the total present value of future benefits allocated to service already rendered is the actuarial accrued liability. Deducting the valuation assets produces the unfunded actuarial accrued liability. We have amortized the unfunded actuarial accrued liability (UAAL) over 30 years, the maximum period for reporting purposes pursuant to GASB Statements 43 and 45. The amortization payments were computed to remain level as percents of payroll.

The contribution rates shown below are expressed as level percents of active member payroll. The annual dollar amounts of contributions are assumed to increase as payroll increases.

	Annual Required Contribution As a Level % of Payroll
Normal Cost	20.46%
Unfunded Actuarial Accrued Liability	38.70
Total Computed Contribution Rate	59.16%
Annual Required Contribution FY 10/11*	\$4,381,269

*Based on valuation payroll projected to FY 11/12.

Last year the computed annual required contribution rate was 42.06% of payroll, or \$4,533,229.

Section Two: Actuarial Calculations -- Funding

RETIREE HEALTH PROGRAM CASH FLOW PROJECTION

Funding Rate to Remain Solvent for 50 Years (Current Policy)

Year Ended 12/31	Asset Value 1/1	Asset Balance				% of Payroll			
		Contribs.	Benefits	Net	Inv. Income	Inflated \$	Constant \$	Contribs	Benefits
2010	\$32,313,276	\$3,477,573	\$3,161,665	\$315,908	\$2,435,342	\$35,064,527	\$35,064,527	44.65%	40.59%
2011	35,064,527	3,616,821	4,336,796	(719,976)	2,602,840	36,947,392	35,526,338	44.65%	53.54%
2012	36,947,392	3,771,715	4,655,241	(883,527)	2,737,922	38,801,787	35,874,433	44.65%	55.11%
2013	38,801,787	3,935,842	5,065,673	(1,129,830)	2,867,765	40,539,722	36,039,665	44.65%	57.47%
2014	40,539,722	4,085,199	5,530,928	(1,445,729)	2,986,264	42,080,257	35,970,380	44.65%	60.45%
2015	42,080,257	4,241,181	5,958,361	(1,717,181)	3,091,625	43,454,702	35,716,597	44.65%	62.73%
2016	43,454,702	4,414,488	6,300,259	(1,885,770)	3,188,386	44,757,318	35,372,358	44.65%	63.72%
2017	44,757,318	4,607,502	6,693,803	(2,086,301)	3,278,563	45,949,580	34,917,904	44.65%	64.87%
2018	45,949,580	4,824,646	7,121,548	(2,296,902)	3,360,085	47,012,763	34,351,765	44.65%	65.91%
2019	47,012,763	5,051,631	7,583,380	(2,531,749)	3,431,017	47,912,030	33,662,357	44.65%	67.03%
2024	48,984,697	6,337,033	10,498,898	(4,161,864)	3,517,782	48,340,615	27,915,501	44.65%	73.97%
2029	43,856,778	8,165,584	12,734,656	(4,569,073)	3,117,918	42,405,623	20,127,508	44.65%	69.63%
2034	35,474,131	10,381,711	14,887,858	(4,506,147)	2,491,579	33,459,563	13,053,294	44.65%	64.03%
2039	25,261,209	13,017,561	17,020,270	(4,002,709)	1,744,489	23,002,989	7,375,941	44.65%	58.38%
2044	13,147,777	16,113,922	19,409,456	(3,295,534)	862,501	10,714,743	2,823,893	44.65%	53.78%
2049	2,895,789	20,044,086	21,500,290	(1,456,204)	162,577	1,602,162	347,061	44.65%	47.89%
2054	1,887,220	25,002,844	23,098,634	1,904,210	212,949	4,004,379	712,965	44.65%	41.25%
2059	25,144,168	31,321,203	24,070,116	7,251,087	2,157,728	34,552,983	5,056,522	44.65%	34.31%

City of Pontiac
Police and Fire Employees' VEBA

- 4 -

December 31, 2009 Valuation

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Section Two: Actuarial Calculations – Funding

Comments

Comment 1: The Governmental Accounting Standards Board (GASB) Statements 43 and 45 concern financial reporting for “other post employment benefits” (OPEB), which are non-pension benefits including retiree health benefits. The standards apply to the plan (Statement 43) and the plan sponsor (Statement 45). Among the required disclosures are the annual OPEB expense, liabilities, funded status and funding progress. Actuarial valuations to determine these disclosures are required at least every 3 years for plans with fewer than 200 participants and at least every 2 years for Plans with 200 participants or more.

Comment 2: The GASB statements do not mandate that the plan sponsor pre-fund OPEB liabilities. However, if the plan sponsor’s funding policy is to contribute less than the Annual Required Contribution (ARC), the GASB standards require that a lower assumed rate of investment return, reflecting the assumed rate of return on the City’s General Fund, be used to compute the liabilities and Annual Required Contribution. This will increase the liabilities, ARC, and the OPEB obligation that must be reported in the financial statements. The OPEB obligation represents the cumulative difference between the annual OPEB cost and the employer’s actual contribution.

Comment 3: The contribution rate under the current funding policy would be 44.65% of payroll. This rate is expected to provide, in combination with plan assets, full payment of promised benefits through the year 2059. Contributing at the rate of 44.65% under the current funding policy would be less than fully funding the ARC. If the City continues to fund under the current funding policy, the GASB ARC would need to be recalculated at a lower interest rate to reflect partial funding.

Comment 4: The liabilities for health insurance premiums are highly dependent upon the underlying assumptions concerning medical care inflation and the investment return rate. For the purposes of this valuation, we assumed a 7.50% investment return rate and a 10.00% annual medical care inflation rate in the first year, decreasing in 0.5% increments over the following 12 years to the ultimate assumed rate of 4.0%. Liabilities and computed contributions would be greater if a higher medical care inflation rate is assumed or a lower investment return rate. Liabilities and computed contributions would be less if a lower medical care inflation rate is assumed or a higher investment return rate. If the City does not plan to contribute the Annual Required Contribution Rate, the assumed rate of investment return would be lower.

To show the sensitivity of results to the assumed investment return rate we also performed the valuation assuming an annual rate of investment return of 5.0%, which is 1.0% over the assumed wage inflation assumption of 4.0%. The results based on this investment return assumption are shown below.

Section Two: Actuarial Calculations -- Funding

Actuarial Accrued Liabilities Based on Alternate 5.0% Investment Return Assumption

Active participants	\$38,944,583
Vested participants	8,524,149
Retirees and Beneficiaries	<u>77,938,065</u>
Total Actuarial Accrued Liability	125,406,797
 Funding Value of Assets	 32,313,276
 Unfunded Actuarial Accrued Liability	 \$93,093,521

**Computed Contribution Rates as Level %'s of Payroll
Based on Alternate 5.0% Investment Return Assumption**

Normal Cost	40.52%
Unfunded Actuarial Accrued Liability	<u>48.20</u>
Total Computed Contribution Rate	88.72%
Dollar Contribution	\$6,570,422

Comment 4: The unfunded actuarial accrued liabilities were amortized over the maximum 30 year period permitted for reporting purposes under the GASB standards. A shorter period would result in higher computed contribution rates.

Comment 5: In order for assets to be considered in determining the unfunded actuarial accrued liability, the assets must be a) irrevocably held in a trust or equivalent arrangement, b) dedicated to providing benefits to retirees and their beneficiaries in accordance with the terms of the plan, and c) legally protected from creditors of the employer or plan.

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Section Three:
Benefit Provisions



Section Three: Benefit Provisions

Benefit Provision Summary

Division	Health including Prescription Coverage	Dental Coverage	Optical and Hearing Coverage
Non-Union Management			
Any age with 25 yrs. of service or age 50 with 10 yrs of service.	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 7/1/2002).	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 7/1/2002).	Retired on or after 7/1/85. City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 7/1/2002).
PPSA Police Command			
Any age with 25 yrs. of service or age 50 with 10 yrs of service.	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 4/22/1997).	City pays for retiree and spouse and for eligible dependents to age 25.	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 10/1/1984).
PPOA Police			
Any age with 25 yrs. of service or age 50 with 10 yrs of service.	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 4/22/1997).	City pays for retiree and spouse and for eligible dependents to age 25.	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 10/1/1984).
PEFA Fire			
Any age with 25 yrs. of service or age 50 with 10 yrs of service.	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 4/22/2001).	City pays for retirees and spouse and eligible dependents to age 25.	City pays for retiree and spouse (pays for eligible dependents to age 25 on or after 7/1/1984).

Other Plan Provisions:

- There are no member contributions.
- Only retired members of the Police and Fire Retirement System who retired on or after August 22, 1996 are covered by the VEBA.
- Deferred vested members are eligible for retiree health care coverage upon retirement (except for post-retirement life insurance benefits).
- These benefits (except for Life Insurance) continue to an eligible beneficiary after the retiree's death.
- Medicare part B premiums are paid by the City for each eligible retiree and spouse on a pay-as-you-go basis through the City's general account.
- Post-retirement Life Insurance (amount varies based on benefit group and date of retirement) is also provided.



Section Four:

***Actuarial Assumptions
And Methods***



Section Four: Actuarial Assumptions and Methods

Actuarial Assumptions

Economic Assumptions

- (i) Interest Rate 7.50% (net of expenses)
- (ii) Medical Inflation Rate 10.0%, graded down to 4.0% in 0.5% increments over 12 years
- (iii) Salary Increases
 Across-the-Board 4.0%
 Merit and Longevity Service related rates

Sample Annual Rates of Salary Increase

Years of Service	Base Economic	Merit & Longevity		Total	
		Police	Fire	Police	Fire
1	4.0%	9.6%	7.0%	13.6%	11.0%
2	4.0%	6.0%	7.0%	10.0%	11.0%
3	4.0%	5.7%	7.0%	9.7%	11.0%
4	4.0%	5.4%	6.5%	9.4%	10.5%
5	4.0%	0.5%	6.0%	4.5%	10.0%
6	4.0%	0.5%	6.0%	4.5%	10.0%
7	4.0%	0.5%	0.5%	4.5%	4.5%
8	4.0%	0.5%	0.5%	4.5%	4.5%
Over 8	4.0%	0.5%	0.5%	4.5%	4.5%

Section Four: Actuarial Assumptions and Methods

Demographic Assumptions

(i) Mortality

1994 Group Annuity Mortality Table
set back one year for males and females.

Sample Ages	Value of \$1 Monthly for Life		Future Life Expectancy (Years)	
	Men	Women	Men	Women
55	\$134.46	\$142.12	27.0	31.1
60	124.60	133.88	22.7	26.5
65	113.00	123.84	18.6	22.1
70	100.30	112.29	15.0	18.1
75	86.40	98.51	11.7	14.3
80	71.54	83.08	8.9	10.9

(ii) Disability

Sample Ages	Percent Becoming Disabled Within Next Year
25	0.08%
30	0.11%
35	0.20%
40	0.29%
45	0.43%

Section Four: Actuarial Assumptions and Methods

(iii) Termination of Employment

Service related rates for first 5 years of employment. Age related rates for after first 5 years of employment

Sample Ages	Years of Service	Percent Terminating Within Next Year	
		Police	Fire
All	0	10.0%	8.0%
	1	7.0	6.0
	2	5.0	5.0
	3	4.0	4.0
	4	3.5	3.0
20	5 & Over	3.5	3.5
25		3.5	3.5
30		2.9	2.9
35		1.5	1.5
40 - 44		0.6	0.6
45 & Over		0.5	0.5

Section Four: Actuarial Assumptions and Methods

(iv) Retirement Rates

Age-related rates and Service related rates

Active Members Retiring within Year
Following Attainment of Indicated Retirement Age

Age Related Rates		Service Related Rates	
Age	Percent Retiring	Years of Service	Percent Retiring
50	35%	25	40%
51	35	26	40
52	40	27	40
53	40	28	40
54	45	29	40
55	45	30	50
56	20	31	60
57	20	32	70
58	20	33	80
59	20	34	90
60	20	35	100
61	20		
62	100		

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*Section Four: Actuarial Assumptions and Methods***Actuarial Method Used for the Valuation**

Normal Cost. Normal cost and the allocation of actuarial present values between service rendered before and after the valuation date were determined using an individual entry age actuarial cost method having the following characteristics:

- ❖ The annual normal costs for each individual active participant, payable from date of hire to date of retirement, are sufficient to accumulate the value of the participant's benefit at the time of retirement;
- ❖ Each annual normal cost is a constant percentage of the participant's year-by-year projected covered pay.

Financing of Unfunded Actuarial Accrued Liability. Unfunded actuarial accrued liability was amortized as a level percent of payroll over 30 years.



Section Five:
Valuation Data

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Section Five: Valuation Data

Financial Information

The net market value of assets was reported to be \$26,702,462 as of December 31, 2009. Reported revenues and expenditures for 2009 are as follows:

Market Value 12/31/2008	\$20,529,605
Revenues	
Member Contributions	0
Employer Contributions	2,816,172
Investment Income	
Interest	1,141
Dividends	650,365
Gain/Loss on Sales of Investments (Net of Expenses)	121,885
Unrealized Gain	5,182,356
Total Revenues	8,771,919
Expenditures	
Insurance Premiums Paid for Retirees	2,572,834
Administrative Expenses	26,228
Total Expenditures	2,599,062
Market Value 12/31/2009	\$26,702,462

Section Five: Valuation Data

As of December 31, 2009 the funding value of assets (smoothed market value) was computed to be \$32,313,276.

Funding Value of Assets

	<u>12/31/2008</u>	<u>12/31/2009</u>
1. Beginning of Year Assets		
a) Market Value	\$31,696,389	\$20,529,605
b) Valuation Assets	30,185,216	31,405,001
2. End of Year Market Value of Assets	20,529,605	26,702,462
3. Net Additions to Market Value		
a) Net Contributions	2,809,333	2,816,172
b) Net Investment Income = (3d) - (3a) - (3c)	(12,086,836)	5,955,748
c) Benefit Payments, Refunds and Admin. Expenses	(1,889,281)	(2,599,062)
d) Total Additions to Market Value	(11,166,784)	6,172,858
4. Average Valuation Assets = (1b) + .5 x [(3a) + (3c)]	30,645,242	31,513,536
5. Expected Income at Valuation Rate = 7.5% x (4)	2,298,393	2,363,517
6. Investment Gain (Loss) = (3b) - (5)	(14,385,229)	3,592,231
7. Phased-In Recognition		
a) Current Year: 0.2 x (6)	(2,877,046)	718,446
b) First Prior Year	(206,476)	(2,877,046)
c) Second Prior Year	559,490	(206,476)
d) Third Prior Year	133,234	559,490
e) Fourth Prior Year	392,137	133,234
f) Total Recognized Investment Gain/(Loss)	(1,988,660)	(1,672,351)
8. Change in Valuation Assets = (3a) + (3c) + (5) + (7f)	1,219,785	968,276
9. End of Year Assets		
a) Market Value = (2)	20,529,605	26,702,462
b) Valuation Assets = (1b) + (8)	31,405,001	32,313,276
c) Ratio of Market to Valuation Assets	65%	83%
10. Recognized Rate of Return	0.98%	2.19%
11. Estimated Market Rate of Return	(37.59)%	28.86%

Section Five: Valuation Data

Participant Summary**Retirees and Beneficiaries**

As of December 31, 2009, there were 177 retirees included in the valuation, with annualized reported health premiums of \$3,215,244.

Last year there were 136 retirees with annualized reported premiums of \$1,988,898.

**Retirees and Beneficiaries
December 31, 2009**

Attained Age	Totals
40-44	5
45-49	36
50-54	43
55-59	53
60-64	32
65-69	7
75-79	1
Totals	177

Section Five: Valuation Data

Active Participants

As of December 31, 2009, there were 138 active employees.

	<u>12/31/2009</u>	<u>12/31/2008</u>
Number	138	169
Payroll	\$7,405,796	\$9,749,807
Averages		
Age	39.2	40.8
Service	13.2	15.2
Salary	\$53,665	\$57,691

Last year there were 169 active employees with payroll of \$9,749,807.

Active Members - December 31, 2009**Age and Service Distribution**

Attained Age	Service						Totals	
	0-4	5-9	10-14	15-19	20-24	25-29	No.	Payroll
20-24	9						9	\$303,868
25-29	4	2					6	256,945
30-34	7	13	5				25	1,173,626
35-39	3	1	28	2			34	1,776,209
40-44			14	6	8	1	29	1,654,079
45-49			3	8	16	1	28	1,788,495
50-54				1	4		5	340,306
55-59					2		2	112,268
Totals	23	16	50	17	30	2	138	\$7,405,796

Group Averages

Age: 39.2 years
Service: 13.2 years
Annual Pay: \$53,665

Section Five: Valuation Data

Inactive Vested Employees

As of December 31, 2009, there were 23 inactive vested participants. Last year there were 20 inactive vested participants.

Inactive Members December 31, 2009

Attained	
Age	Totals
30-34	1
35-39	8
40-44	4
45-49	10
Totals	23

EXHIBIT D



CITY OF PONTIAC
OFFICE OF THE EMERGENCY MANAGER

LOUIS H. SCHIMMEL

47450 Woodward Avenue
Pontiac, Michigan 48342
Telephone: (248) 758-3133
Fax: (248) 758-3292

Dated: August 1, 2012

ORDER NO. S-225

RE: IAFF Local 376; Pontiac Police Officers Association; Pontiac Police and Supervisors Association; Contract Provision Termination, VEBA Contribution

TO: Sherikla Hawkins, City Clerk
Cathy Square, Human Resources Director
Pontiac Police and Firemens' Voluntary Employee Benefit Association

The Local Government and School District Fiscal Accountability Act (Public Act 4 of 2011) in Section 17(1) empowers an Emergency Manager to issue the orders the Manager considers necessary to accomplish the purposes of the Act and any such orders are binding on the local officials or employees to whom they are issued. Section 19(1) provides that an Emergency Manager may take on one or more additional actions with respect to a local government in receivership: (g) Make, approve or disapprove any appropriation, contract, expenditure...; (lc) After meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment, a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state's sovereign powers if the emergency manager and the state treasurer determine that all of the following conditions are satisfied...; (l) Act as sole agent of the local government in collective bargaining with employees or representatives and approve any contract or agreement; (ee) Take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government. The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities...; and 19(2) ...the authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government under law, charter, and ordinance shall be suspended and vested in the Emergency Manager.

Unlike with the other bargaining units currently active in the City, I have been unable to negotiate any changes to any collective bargaining agreement to allow for termination of those sections of the Collective Bargaining Agreement with the respective unions listed above

concerning contributions to the VEBA for those individuals who are covered by these Collective Bargaining Agreements and retired after August 22, 1996 because these unions no longer exist at the local level and as such do not represent any active employees.

On July 10, 2012, I requested that the State Treasurer concur in my determination under Section 19(k) of the Local Government and School District Fiscal Accountability Act, Public Act 4 of 2011 (Act) to allow termination of those sections of the Collective Bargaining Agreement with the unions listed above concerning contributions to the VEBA for those individuals who are covered by these Collective Bargaining Agreements and retired after August 22, 1996 due to the nonexistence of the above listed unions (at least at the local level).

As stated in the July 10, 2012 correspondence to the State Treasurer, in my sole discretion and judgment, and due to the nonexistence of the above listed unions (at least at the local level), a prompt and satisfactory resolution of outstanding issues is unlikely to be obtained. Therefore, I determined that the four conditions of Section 19(k) of the Act had been satisfied.

On July 16, 2012, the State Treasurer concurred with my determination and made his separate determination (see attached) that the four conditions of Section 19(k) of the Act had been satisfied.

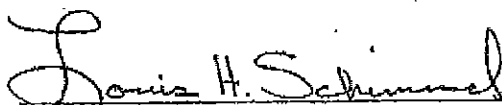
It is hereby ordered:

- Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations.

The Order shall have immediate effect.

Copies of the documents referenced in this Order are to be maintained in the offices of the City Clerk and may be reviewed and/or copies may be obtained upon submission of a written request consistent with the requirements of the Michigan Freedom of Information Act and subject to any exemptions contained in that state statute and subject to any exemptions allowed under that statute (Public Act 442 of 1976, MCL 15.231, et. seq.).

This Order is necessary in order to carry out the duties and responsibilities required of the Emergency Manager as set forth in the Local Government and School District Fiscal Accountability Act (Public Act 4 of 2011) and the contract between the State of Michigan and the Emergency Manager.



Louis H. Schimmel
City of Pontiac
Emergency Manager

cc: State of Michigan Department of Treasury
Mayor Leon B. Jukowski,
Pontiac City Council

72 (Rev. 01-11)



STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RIK SNYDER
GOVERNOR

ANDY DILLON
STATE TREASURER

July 16, 2012

Louis H. Schimmel, Emergency Manager
City of Pontiac
47450 Woodward Avenue
Pontiac, Michigan 48342

Dear Mr. Schimmel:

Thank you for your July 10, 2012 letter, which is enclosed for reference. As the Emergency Manager for the City of Pontiac, you have asked for my concurrence with your determination to modify collective bargaining agreements related to Local 376, the Pontiac Fire Fighters Union, Pontiac Police Officers Association, and Pontiac Police Supervisors Association pursuant to Public Act 4 of 2011, the Local Government and School District Fiscal Accountability Act. The proposed modification would affect health care contributions to a VEBA for individuals who are covered by these collective bargaining agreements and retired after August 22, 1996.

As you are aware, the City is facing a broad, generalized economic problem, as illustrated by the following statistics;

1. The City lost approximately 22 percent of its tax base from 2010 to 2011. Due to restrictions in the Michigan Constitution upon property tax increases, even as economic conditions improve, the City will be able to recover its tax base only at the annual rate of 5 percent or inflation, whichever is less.
2. City property tax revenue decreased from \$12.9 million in fiscal year 2007 to \$10.9 million in fiscal year 2010.
3. City income tax revenue decreased from \$13.3 million in fiscal year 2007 to approximately \$8.7 million in fiscal year 2010.
4. While City general fund expenditures decreased from \$56.1 million in fiscal year 2007 to \$47.2 million in fiscal year 2010, general fund revenues decreased during the same period from \$54.2 million to \$38.4 million.
5. The City has a residential housing vacancy rate of 18 percent (per the 2010 Census compared to an 8 percent vacancy rate per the 2000 Census) and more than 4,700 vacant buildings.

July 25, 2012
Page 2 of 3

6. The City population declined by 12 percent between 2000 and 2010, decreasing by 7,991 from 67,506 to 59,515.

Section 19(1) (k) of the Act authorizes emergency managers to reject, modify, or terminate one or more terms and conditions of an existing collective bargaining agreement. In order to do so, however, the Emergency Manager and State Treasurer must both determine that the following four conditions of Section 19(1) (k) have been satisfied:

- (i) The financial emergency in the local government has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a significant and legitimate public purpose.
- (ii) Any plan involving the rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.
- (iii) Any plan involving rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public, as a whole.
- (iv) Any plan involving the rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

I have reviewed your determination in this regard and agree that all four statutory conditions have been satisfied. In particular, I find that:

- 1. The financial emergency in the City is such that it is reasonable and necessary for the State to intercede in this instance to serve a significant and legitimate public purpose. While improvements have been made to the City's financial condition, additional cost reductions remain essential to the City's long term viability.
- 2. The proposed modification of the collective bargaining agreements as to retiree health care contributions to a VEBA is reasonable and necessary to help address the City's broad generalized financial emergency. Analysis demonstrates that the proposed additional changes to language relating to retiree benefits can save the City approximately \$3.9 million annually, which would make a positive impact upon the City's deficit.
- 3. The modification of collective bargaining agreements is critical to permit further reduction in the total cost of retiree health care, and is directly related to and designed to address the City's financial emergency.
- 4. The proposed modification of the collective bargaining agreements is temporary, involves all retirees, and does not target specific classes of employees.

July 23, 2012

Page 3 of 3

Therefore pursuant to Section 19(1) (k) of the Act, I have also determined that the above statutory conditions have been satisfied and that the proposed changes to the collective bargaining agreements are necessary and appropriate.

Sincerely,



Andy Dillon
State Treasurer

Enclosure



CITY OF PONTIAC
OFFICE OF THE EMERGENCY MANAGER
LOUIS H. SCHIMMEL

47450 Woodward Avenue
 Pontiac, Michigan 48342
 Telephone: (248) 758-3133
 Fax: (248) 758-3292

July 10, 2012

Hon. Andrew Dillon, Treasurer
 State of Michigan
 Michigan Department of Treasury
 Lansing, MI 48922

Re: City of Pontiac/Action Under Section 19(h) of the Local Government and the School District Accountability Act Related to Local 376, Pontiac Fire Fighters Union ("PFFU"), Pontiac Police Officers Association ("PPOA") and Pontiac Police Supervisors Association ("PPSA")

Dear Treasurer Dillon:

During my tenure as Emergency Manager for the City of Pontiac, I have taken steps to reduce the cost of active employee and retiree healthcare. During the course of these efforts, I have worked with Meadowbrook Insurance ("Meadowbrook") in reviewing various healthcare, dental insurance plans and other plans provided to both active employees as well as retirees.

Part of the plans that were in existence when I arrived included a Declaration of Trust and Agreement of the City of Pontiac Police and Fire Retiree Pre-Funded Group Health and Insurance Plan dated August 26, 1996 (Police and Fire Retiree VEBA). This plan was a result of collective bargaining agreements between the above-captioned bargaining units on behalf of police officers and fire fighters which provided for a pre-funded Trust Agreement for retirees of the above-captioned bargaining units who retired on or after August 22, 1996. This plan and Trust provided for pre-funding of the obligations by the employer, City of Pontiac that covered retirees' healthcare benefits. As of March 31, 2012, the VEBA has assets of \$30,891,367. Police and fire retirees prior to August 22, 1996, do not have a similar pre-funded plan in place and the City is paying for their annual healthcare costs on a current cash flow basis.

Article III of the Trust Agreement, Section 1 provides;

"(a) The city-Employer shall be required to pay to the Trust Fund such amounts as the Trustees may determine are actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the Actuary for the Trust to result in Prefunded Plan.

Such contributions shall also be made in accordance with the Collective Bargaining Agreement between the collective bargaining associations and the employer and this Trust Agreement, and such other regulations of the Board of Trustees as are not inconsistent with the aforesaid authority.

(b) In addition to the amounts paid by the City on behalf of Participants as set forth above and in the Collective Bargaining Agreements, the City shall contribute to the Trust Fund such additional moneys which together with those contributions and return on investments shall be sufficient to fund the benefits provided on a sound actuarial basis."

It is anticipated that the City will be required by the Trustees of the VEBA to contribute \$3,915,371 during the fiscal year ending June 30, 2013. This amount exceeds the projected actual costs of the benefits for the retirees covered by this Trust for the same fiscal year by approximately \$915,000.

Given the City's current financial condition it is difficult for the City to make annual payments for current costs of retiree healthcare without the additional burden of the pre-funding costs of this VEBA as determined by the actuaries selected by the Trustees.

Article X, Section 1 of the Trust provides:

"The provisions of this Declaration of the Trust Agreement may be amended at any time, by (A) collective bargaining between the collective bargaining associations identified in Article 1, Section 8 and the City of Pontiac (B) by an unanimous vote of the five (5) Trustees, concurred in by the City Council of the City of Pontiac provided, however, that such Amendments are not inconsistent with any applicable Collective Bargaining Agreements and do not adversely affect the tax exempt status of the 501(c)9 Trust. Except as otherwise provided in this Trust Agreement, the Trustees shall have no power in amending the provisions of this Trust Agreement with respect to the amount of contributions required by the City."

This correspondence is to advise you that in my capacity as Emergency Manager of the City, I am seeking to invoke the actions allowed under Section 19(k) regarding collective bargaining agreements as provided in the Local Government and School District Accountability Act ("Act") MCL 141.1519(k). Section 19(k) provides that both the Emergency Manager and State Treasurer shall determine that four conditions are satisfied in order to allow modification of the existing collective bargaining agreement. I am seeking to amend the Trust Agreement through modification of the collective bargaining agreement to remove Article III, obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. By eliminating the City's obligation to contribute to the Trust the Trustees can pay for the current annual obligations for healthcare for the retirees covered by the Trust Agreement until the Trust assets are exhausted.

I have not met with the PFRU, PPOA or PPSA since those unions no longer exist as a result of subcontracting out police and fire services for the City. Therefore, there are no active associations for any of these unions with which to negotiate this change.

In conversations with members of the Board of Trustees, I, as Emergency Manager, am aware that the five Trustees of the Trust would not unanimously agree to any modifications of this Trust Agreement with respect to the contribution by the City. Unanimous agreement of the Trustees is required under Article X of the Trust Agreement for any amendment initiated by the Trustees. Therefore based on my inability to negotiate with the unions and my inability to obtain amendment by the Trustees there is no prompt or satisfactory resolution to this problem other than exercise of my rights under Section 19(k) with concurrence by Treasury.

I have determined that all the following conditions of Section 19(k) have been satisfied to modify the Trust Agreement through collective bargaining agreement changes as set forth above.

(i) the financial emergency in a local government has created a circumstance in which it is reasonable and necessary for the State to intercede to serve a significant and legitimate purpose.

The City was unable to make its contributions as determined by the Trustees to this VEBA for the fiscal year ending June 30, 2011. As a result the VEBA sought to collect that amount through a lawsuit filed against the City which resulted in a judgment against the City in the amount of \$3,243,232. Unless action is taken to eliminate the VEBA contribution obligation the City anticipates that it will not be able to make the annual contribution required by the Trustees in June 2012, and for subsequent years thereafter. The Trust has adequate assets to pay for current obligations for healthcare benefits for the retirees covered by the Trust for a significant number of years going forward. I am also in the process of modifying the healthcare benefits for these retirees which over time will reduce the amount of the obligations of the City and/or Trustees to fund healthcare benefits for the retirees covered by this Trust.

(ii) any plan involving the rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement as reasonable and necessary to deal with the broad, generalized equalized problem.

The City will not be able to pay the expected VEBA contribution of \$4,381,269 for the fiscal year ending June 30, 2012, to the Trust. The termination of this obligation to the Trust will not create any hardship on the employees covered by the Trust who will continue to receive healthcare benefits paid for by the assets of the Trust. The amount saved in fiscal year beginning in July 1, 2012, by a modification of the collective bargaining agreements obligations to the Trust will significantly contribute to the City's ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year beginning June 1, 2012, and thereafter.

(iii) any plan involving the rejection, modification, or termination of one or more terms of existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public as a whole.

The above action will not only produce cost savings to the City but will contribute to the City's ability to reach a balanced budget without affecting the healthcare benefits of the retirees covered by the Trust.

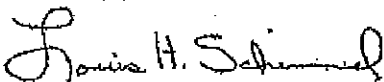
(iv) any plan involving the rejection, modification, or termination of one or more terms of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

The proposed modifications to the Trust through contract modifications are for the term of the emergency manager services and therefore are of a temporary nature subject to review and renewal by the City.

Should you approve this action the City will also seek appropriate concurrence from the Internal Revenue Service under an exemption for the Trust that was received from the IRS for the Trust, under Internal Revenue Code Section 501(3)(9) Employee Welfare Benefit Plans.

Based on the foregoing, I request your written concurrence with my determination pursuant to Section 19(k) of the Act. Time is of the essence. The new fiscal year starts July 1, 2012. In order to have maximum impact on the 2012/2013 fiscal year given the time frames of notice to the Trustees of this action, I urge prompt consideration for this request.

Sincerely,



Louis H. Schimmel
Emergency Manager

cc: Roger Fraser, Deputy State Treasurer

EXHIBIT D

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
**DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL**

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**

BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREMENT SYSTEM,
and BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREE PREFUNDED
GROUP HEALTH AND INSURANCE TRUST,

Plaintiffs,

Case No. 12- 128625 -CZ
Hon. JUDGE DP O'BRIEN

vs.

CITY OF PONTIAC, MICHIGAN,

Defendant.

Anthony A. Asher (P10273)
Matthew I. Henzi (P57334)
Sullivan, Ward, Asher & Patton, P.C.
Attorneys for Plaintiffs
1000 Maccabees Center
25800 Northwestern Highway
Southfield, Michigan 48075-8412
Telephone: (248) 746-0700
Facsimile: (248) 746-2760
Email: mhenzi@swappc.com

COMPLAINT

There is no other pending or resolved civil action arising out of the transaction
or occurrence alleged in the Complaint.


Matthew I. Henzi (P57334)

NOW COME Plaintiffs, by and through their attorneys, Sullivan, Ward, Asher &
Patton, P.C., and for their Complaint against Defendant, state as follows:

VENUE AND JURISDICTION

1. Defendant, City of Pontiac, Michigan (the "City"), is a municipal entity, incorporated under the Home Rule City Act, MCL 117.1 *et. seq.*, located in Oakland County, Michigan and is organized under the Home Rule City Act, MCL 117.1 *et seq.*

2. The City sponsors the City of Pontiac Police and Fire Retirement System ("PFRS"), an ordinance based governmental defined benefit retirement plan, recognized by the Internal Revenue Code as a qualified trust under IRC section 401(a). PFRS provides retirement benefits for all police and fire employees of the City. The PFRS is located in Pontiac, Michigan.

3. The PFRS is administered by a five-member Board of Trustees, as specified by City Ordinance. The Board of Trustees delegates routine administrative matters to its Retirement System Administrator and her staff comprised of 3 individuals.

4. The City has also established by ordinance The City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust (the "Trust") to provide health, optical, dental, and life insurance benefits for retirees who are members of the PFRS and who retired from the City on or after August 22, 1996. The Trust was created as an Internal Revenue Code 501(c)(9) as a (VEBA). The Trust is located in Pontiac, Michigan.

5. The Trust is administered by a five-member Board of Trustees, as specified by City Ordinance.

6. Venue is appropriate in Oakland County pursuant to MCL 600.1615.

7. The amount in controversy exceeds \$25,000.00, exclusive of costs, interest, and attorney fees.

FACTUAL ALLEGATIONS - PFRS

8. The PFRS is a governmental plan under Internal Revenue Code 414 and was established by ordinance, as last amended in 2007 and as codified on the City's website as Chapter 92 of the City's Ordinance Code.

9. The PFRS is governed by the State of Michigan's constitution, *Const. 1963, Art. 9, §24*, which provides that:

The accrued financial benefits of each pension plan and retirement system of a state in its political subdivision shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits, annual funding.

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

10. Under this section of the constitution, the People of the State of Michigan have imposed a duty upon the City to fund, during any fiscal year, financial benefits arising under the PFRS on account of services rendered in that year.

11. The PFRS is also governed by Public Act 314, the Public Employee Retirement System Investment Act, MCL 38.1132 et. seq. ("PA 314")

12. The PFRS System is a trust fund, separate and distinct from the City, and the assets of the System shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the System. MCL 38.1133(6).

13. Section MCL 38.1140(m) of PA 314 requires the City to annually contribute the "actuarially determined contribution amount." The contribution amount is defined as follows:

... the required employer contribution is the actuarially determined contribution amount. An annual required employer contribution in a plan under this Act shall consist of a current

service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability. (Emphases added).

14. According to MCL 38.1140(m), the trustees of the PFRS have the sole responsibility and authority in hiring an actuary and determining the required employer contribution that the City must make annually.

15. In addition to the funding requirements of the Michigan Constitution and PA 314, the PFRS Ordinance requires member contributions, the amount of which is determined by collective bargaining between the members' unions and the City and City contributions in an amount which will be sufficient to provide for the benefits earned during the year of service. The Ordinance further requires the City to contribute those costs as determined necessary according to an actuarial valuation. See Section 92-114 of the Ordinance.

16. On October 19, 2010, Sandra W. Rodwan, EA, MAAA, FCA, President of Rodwan Consulting Company ("Rodwan"), the actuarial consulting firm for the PFRS, prepared the Annual Actuarial Valuation for the PFRS as of December 31, 2009. The actuarial report is not attached since it is in the possession of the City and its attorneys.

17. The purpose of the actuarial valuation was to:

- A. compute the liabilities associated with benefits likely to be paid on behalf of current, retired, active, vested, inactive members of the Retirement System;
- B. Compare accrued assets with accrued liabilities to assess the funded condition of the Retirement System, and
- C. Compute the City's required contribution rate for the fiscal year beginning July 1, 2011.

18. The actuary, using actuarial assumptions previously approved by the Board of Trustees and the actuary, computed the City's required contribution for the fiscal year beginning on July 1, 2011 to be \$1,527,193.00, or 20.62% of valuation payroll.

19. The Actuarial Valuation assumes that the City's required contribution will be paid to PFRS in two semi-annual payments, the first in December and the second in June. The contribution, when calculated by the actuary, is reduced to account for the anticipated interest that the December payment will accrue during the six month period prior to the end of the fiscal year. Because the City failed to make any contributions for fiscal year July 1, 2011 - June 30, 2012, the City's required contribution must be increased by a percentage determined by the actuary for each day the payment is received after its due date to account for lost interest.

20. The City is currently in receivership under Michigan Public Act 4 of 2011. As such, the State has appointed an Emergency Manager to control the finances of the City.

21. The Trustees of the PFRS are fiduciaries, pursuant to statute, ordinance, and bylaws and are to discharge their fiduciary duty solely in the interest of the participants and the beneficiaries of the PFRS.

22. The Trustees of the PFRS have a statutory duty, pursuant to MCL 38.1140(m), to confirm that the City paid its required employer contribution according to statute.

23. On July 9, 2012, Plaintiffs, through their counsel, sent written demand to the Emergency Manager, through his counsel, for payment of all required City contributions for the PFRS and the Trust. The total due from the City to PFRS is \$1,333,070.30. This amount was calculated based the percentage of actual payroll, for police and fire employees for the month of July 2011. From August 1, 2011-December 31, 2011, this amount was calculated based on the percentage of actual payroll of fire employees, only. From January 1, 2012-June 30, 2012,

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the amount calculated was based on a pro rata share of the hard dollar figure calculated by the actuary, stated in paragraph 18, above.

24. The City did not respond to the request. Further, the City's Emergency Manager has published statements indicating the city will not pay these contributions. As such, Plaintiffs file this lawsuit to compel the City's employer contribution to the PFRS for all applicable periods.

FACTUAL ALLEGATIONS - THE TRUST

25. The Trust was created on August 22, 1996. The settlors to the Trust include the City and the Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Plan. A copy of the Trust is not attached to this Complaint since it is in the possession of the City and its attorneys.

26. The Trustees of the Trust are fiduciaries and are required to discharge their fiduciary duty in the sole interest of the participants and beneficiaries of the Trust.

27. The Trust requires the City to make certain contributions to the Trust, as follows:

Section 3: Contributions - The term "contributions" as used herein, shall be mean the payment required to be made to the trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing collective bargaining agreements or any future collective bargaining agreements for the purpose of providing group health hospitalization and dental and optical and group life insurance for employees, retirees, and beneficiaries covered by the Plan.

Pages 2-3 of Trust.

28. The Trust permits the Trustees to compel and enforce payment of payments of contributions and that time is of the essence as to all payments to the Trust, as follows:

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Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this trust fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the trust and the providing of benefits under various insurance programs.

Pages 7-8 of Trust.

29. The Trust obligates the City to pay the Trust's attorneys' fees for the instant suit, as follows:

Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the collective bargaining agreement and the performance of all obligations provided in this Trust. ...in a suit or action brought by the Trustees commenced pursuant to this section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees.

30. The City intended that the benefits provided by the Trust would be constitutionally protected, as follows:

Article 2. Establishment of Trust, Section 1:

The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan establishing in accordance with the terms of the Trust Fund. The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution.

(Emphasis added. Page 5 of Trust.)

31. The Trust exists for the exclusive purpose of providing through policies issued by duly licensed commercial insurance companies, through a fund of self-insurance or through

any other lawful means of providing insurance, group health and hospitalization, dental and optical insurance in accordance with collective bargaining agreements between the City and applicable Police and Fire Collective Bargaining Associations, for the benefit of their Police and Fire retirants and beneficiaries who are eligible to participate in accordance with the Plan.

32. The City is required to pay to the Trust Fund "such amounts as the trustees may determine are actuarially certified and are actuarially necessary to fund the trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the actuary for the Trust to result in a pre-funded plan. Page 6-7 of Trust.

33. On June 8, 2011, Sandra Rodwan, EA, MAA, FCA, President of Rodwan Consulting Company ("Rodwan"), the actuarial consulting firm for the Trust prepared the annual actuarial valuation for the Trust as of December 31, 2009. The actuarial report is not attached since it is in the possession of the City and its attorneys.

34. The actuary, using actuarial assumptions previously approved by the Board of Trustees in the actuary, computed the City's required contribution for the fiscal year beginning on July 1, 2011 to be \$4,381,269.00, or 44.65% of valuation payroll.

35. On July 9, 2012, the Trustees of the Trust sent written demand to the Emergency Manager, through his attorney, for payment of the City's required contributions for the PFRS and the Trust. The total due from the City to the Trust is \$3,473,923.28. This amount was calculated based on the percentage of actual payroll, using the percentage rate calculated by the actuary. The amount was calculated in July 2011 based on actual payroll of fire and police employees during July 2011. From August 1, 2011-December 31, 2011, the amount was based on actual payroll of fire employees, only, because there were no police employees. From

January 1, 2012 through June 30, 2012, the amount was calculated based on a pro rata share of the hard dollar figure calculated by the actuary, stated in paragraph 34, above.

36. The City did not respond to the request. Further, the City's Emergency Manager has published statements indicating the city will not pay these contributions. As such, Plaintiffs file this lawsuit to compel the City's employer contribution to the Trust for all applicable periods.

COUNT I - VIOLATION OF MICHIGAN CONSTITUTION - PFRS

37. Any accrued financial benefits of a public retirement system pension plan are, by Constitutional mandate through Const. 1963, Article 9, §24, a contractual obligation which cannot be diminished or impaired.

38. This section of the Constitution also requires that benefits arising on account of service rendered in each year be funded during that year.

39. The Trustees of the PFRS have the sole authority to calculate the City's pension contribution.

40. The City has failed to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012. Further, the City has indicated that it does not intend to make this contribution.

41. The City's failure to pay its employer contribution to the PFRS is a violation of Article 9, §24 of Michigan's Constitution.

42. This court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

43. An actual controversy exists between Plaintiffs and Defendant that can only be determined by an adjudication in the nature of a declaratory judgment as provided by law and court rule.

44. The City's violation of Constitution's 1963 Article 9, §24 is a failure to honor its contractual obligation, which cannot be diminished or impaired by the City.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated Article 9, §24 of the Michigan Constitution of 1963 by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT II - VIOLATION OF MICHIGAN CONSTITUTION - THE TRUST

45. By entering into the Trust, the City expressly indicated its intent that benefits provided under the Trust were statutorily mandated and that the City had a contractual obligation to pay its contribution on an annual basis to the Trust and that this obligation could not be diminished or impaired by the actions of its officials or governing body.

46. Any accrued financial benefits of a public retirement system pension plan are, by Constitutional mandate through Const. 1963, Article 9, §24, a contractual obligation which cannot be diminished or impaired.

47. This section of the Constitution also requires that benefits arising on account of service rendered in each year be funded during that year.

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48. The Trustees of Trust have the sole authority to calculate the City's pension contribution.

49. The City has failed to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012. Further, the City has indicated that it does not intend to make this contribution.

50. The City's failure to pay its employer contribution to the Trust is a violation of Article 9, §24 of Michigan's Constitution.

51. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

52. An actual controversy exists between Plaintiffs and Defendant that can only be determined by an adjudication in the nature of a declaratory judgment as provided by law and court rule.

53. The City's violation of Constitution's 1963 Article 9, §24 is a failure to honor its contractual obligation, which cannot be diminished or impaired by the City.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated Article 9, §24 of the Michigan Constitution of 1963 by failing to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

**COUNT III - VIOLATION OF PUBLIC EMPLOYEE RETIREMENT SYSTEM
INVESTMENT ACT, MCL 38.1132 ET. SEQ., PA 314 - PFRS**

54. MCL 38.1140(m) required the City to make its annual contribution to the PFRS and that the contributions shall consist of the current service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability.

55. The Trustees of the PFRS have the sole responsibility and authority to determine the City's annual contribution.

56. The City's failure to pay its annual contribution for fiscal year July 1, 2011 - June 30, 2012 is a violation of the above-cited statute.

57. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

58. An actual controversy exists between Plaintiffs and Defendant that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated the Public Employee Retirement System Investment Act, MCL 38.1132 et. seq., Public Act 314, by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT IV- VIOLATION OF ORDINANCE AND BREACH OF TRUST - THE TRUST

59. The City created a Trust Agreement and adopted it as an ordinance, and therefore became obligated to make annual contributions for certain health care benefits for eligible participants according to the terms of the Trust/Ordinance.

60. The terms of the Trust/Ordinance indicate that the City intended the benefits to be constitutionally mandated and that the obligation for the City to make its contribution could not be diminished or impaired.

61. The City has failed to timely make its contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012 and has further indicated that it will not make this contribution.

62. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

63. An actual controversy exists between Plaintiffs and Defendant that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated its Ordinance by failing to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

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COUNT V - VIOLATION OF ORDINANCE AND BREACH OF TRUST- PFRS

64. The City created a Trust which was adopted pursuant to the PFRS Retirement Ordinance, codified within Chapter 92 of the City's Ordinance Code. As such, the City is required to make annual contributions to the PFRS.

65. The City has failed to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012 and has indicated that it will not make the contribution.

66. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

67. An actual controversy exists between Plaintiffs and Defendants that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated the PFRS Retirement Ordinance, codified within Chapter 92 of the City's Ordinance Code by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT VI - BREACH OF CONTRACT - TRUST AND PFRS

68. The City has failed to pay its annual required contributions to the Trust and the PFRS in violation of its obligations pursuant to contract with Plaintiffs.

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69. Based on the above-described omissions and breaches of the contract between the parties, the City has caused Plaintiffs to suffer substantial and irreparable damage.

70. Pursuant to contract between the parties, the City is required to pay its annual contributions to the PFRS and the Trust.


71. The City has breached the terms and conditions of its contract thereby causing irreparable damage to Plaintiffs.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to together with costs, interest, and attorneys' fees.

Respectfully submitted,

SULLIVAN, WARD,
ASHER & PATTON, P.C.

By:


MATTHEW I. HENZI (P57334)
Attorney for Plaintiffs
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075-8412
(248) 746-0700

Dated: August 8, 2012
W1181864/PPF/115999

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

Approved, SCAO

Original - Court
1st copy - Defendant2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO. 2012-128625-CZ JUDGE DP O'BRIEN
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Court address

1200 N. Telegraph, Pontiac MI 48341

Court telephone no.

248-868-1000

Plaintiff's name(s), address(es) and telephone no(s).
Board of Trustees of the City of Pontiac Police and Fire Retirement System, and Board of Trustees of the City of Pontiac Police & Fire Retiree Prefunded Group Health and Insurance Trust

v

Defendant's name(s), address(es), and telephone no(s).
City of Pontiac, Michigan

Plaintiff's attorney, bar no., address, and telephone no.

Anthony A. Asher (P10273)/Matthew I. Henzi (P57334)
Sullivan, Ward, Asher & Patton, PC
25800 Northwestern Highway - Suite 1000
Southfield MI 48075 (248)746-0700

SUMMONS

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. YOU HAVE 21 DAYS after receiving this summons to file an answer with the court and serve a copy on the other party or take other lawful action with the court (28 days if you were served by mail or you were served outside this state). (MCR 2.111(C))
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint. This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

Issued

AUG 08 2012

This summons expires

NOV 07 2012

Court clerk

Bill Bullard Jr.

*This summons is invalid unless served on or before its expiration date.

This document must be sealed by the seal of the court.

COMPLAINT

Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.

Family Division Cases

- ☐ There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.
- ☐ An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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General Civil Cases

- ☒ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- ☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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VENUE

Plaintiff(s) residence (include city, township, or village)

Pontiac Michigan

Defendant(s) residence (include city, township, or village)

Pontiac, Michigan

Place where action arose or business conducted

Pontiac Michigan

August 8, 2012

Date

Signature of attorney/plaintiff

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you to fully participate in court proceedings, please contact the court immediately to make arrangements.

MC 01 (3/08) **SUMMONS AND COMPLAINT**

MCR 2.102(B)(11), MCR 2.104, MCR 2.105, MCR 2.107, MCR 2.113(C)(2)(e),(h), MCR 3.208(A)

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PROOF OF SERVICE

SUMMONS AND COMPLAINT
Case No. _____

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

<input type="checkbox"/> OFFICER CERTIFICATE I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.101(A)(2)), and that: (notarization not required)	OR	<input type="checkbox"/> AFFIDAVIT OF PROCESS SERVER Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notarization required)
--	----	---

- ☐ I served personally a copy of the summons and complaint,
☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint,
 together with _____

List all documents served with the Summons and Complaint

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

- ☐ I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complete address(es) of service	Day, date, time

I declare that the statements above are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Mileage fee	Total fee
\$		\$	\$

Signature _____

Name (type or print) _____

Title _____

Subscribed and sworn to before me on _____, _____ County, Michigan.
Date

My commission expires: _____ Signature: _____
Date Deputy court clerk/Notary public

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with

Attachments _____

_____ on _____
Day, date, time

Signature _____ on behalf of _____

Received for Filing Oakland County Clerk 2012 AUG 08 PM 02:20